

NON PHYSICAL DAMAGE

A COMPARATIVE PERSPECTIVE

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To my mentors:

Dr. Maria Emilia Lloveras (*in memoriam*) and Dr. João Baptista Villela

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PREFACE

The interest of jurists in legal systems other than their own has been a matter of long tradition. All legal systems have the same purpose of regulating and harmonizing the human activity within their respective societies, and in each society the legal system forms part of the culture and civilization as well as of the history and the life of its people. Many legal problems are conceptually the same wherever they arise. Jurists from different systems confront the same problems. Sometimes codes and case law give the same answer, sometimes those answers are different; if this was the case, I wanted to explore whether some answers were better than others.

It would certainly not be accurate to say that there has been no approximation between the civil law and the common law traditions. Arguments that these two systems are drawing progressively closer can be heard more and more often. In spite of having started from opposite extremes, it is said that as a result of the movements the civil law and the common law have made in the direction of the other, there is no longer much difference between them. The same social needs, and similar economic and technical conditions, have led to the adoption of similar solutions for their legal problems. However, even admitting as a fact that the results might be close to each other, the methods used to reach them are nevertheless extremely divergent. After all, the ‘idioms of legal thought’ and the guiding habits of mind are different. A civilian naturally reasons from principles to instances, the common lawyer from instances to principles. The civilian puts his faith in syllogisms, the common lawyer in precedents; the first silently asking himself as each new problem arises, ‘What should we do this time?’ and the second asking aloud in the same situation, ‘What did we do last time?’ The civilian thinks in terms of rights and duties, the common lawyer in terms of remedies. The civilian is chiefly concerned with the policy and rationale of a rule of law, the common lawyer with its pedigree. The instinct of a civilian is to systematize, the working rule of the common lawyer is *solvitur ambulando*.¹

By the end of the nineteenth century, Oliver Wendell Holmes was telling Americans not to study civil law because ‘it tends to encourage a dangerous reliance...on glittering generalities’ instead of ‘the exhaustive analysis of a particular case which the common law begins and ends.’² It has not always been so. At the beginning of the same century, new

¹ Thomas Mackay Cooper, ‘The common law and the civil law-A Scot’s view.’ (1950) 63 *Harvard Law Review* 468, 470

² Oliver W Holmes, ‘Misunderstandings of the Civil Law.’ (1871) 6 *American Law Review*, 37, 49.

translations appeared of Grotius, Puffendorf, Pothier and Domat.³ Courts and treatise writers used them. An English judge praised Pothier as the highest authority one could cite next to an English case.⁴ A New York court consulted Grotius, Puffendorf and Barbeyrac to decide who owned a fox caught on Long Island, a decision that still appears in many American casebooks.⁵

At no point does this thesis have the purpose of pretending to demonstrate the cultural superiority of one system over the other. Each system possesses strong characteristic of a distinct and comprehensive nature that establishes its own individuality. In its own ethnic and historical framework, each system serves well the society in which it functions; each has demonstrated its ability to satisfy the social and economic needs of a world in constant change. Each has also maintained a balance between the elements of flexibility and adaptation, on the one hand, while assuring the essential attributes of stability and security, on the other. I assumed from the beginning that comparative law is much more than a set of different legal rules. It has a historical, political, social and cultural dimension. The law is rooted in the culture, it reflects the *Volksgeist* (the spirit of the People) and it responds to the specific demands of a given society in a given time and place. Substitution of one legal tradition for another would neither be possible nor desirable.

At the start of this research, a shocking contrast between styles revealed that the difficulties were going to be huge. To a civilian lawyer who was having his first contact with the common law, it looked as if I had in front of my eyes a gigantic, disorganized, amorphous mass of cases. It was not until later, that I learned that the same feeling existed among common law lawyers. It was not a civilian, but Bernard Rudden who wryly observed that ‘the alphabet is virtually the only instrument of intellectual order of which the common law makes use.’⁶ In particular, in relation to torts, it has been submitted that the fundamental reason for this is that, unlike the law of property or the law of contract, both of which (at least in part) have to formulate guidelines within which individuals can arrange their affairs, the law of torts always has to respond retrospectively to alleged wrongdoings.⁷ In any event, the fact is that it was clear from the beginning that the lack of normative coherence and consistency that a code provides (and to which I was used to) was going to represent for me a permanent source of disorientation.

³ Simpson, ‘Innovation in nineteenth century contract law.’ (1975) 91*Law Quarterly Review*, 247.

⁴ *Cox v Troy*, 5 B & Ald 474, 480 (1822) by Best, J.

⁵ *Pierson v Post*, 3 Cai. R. 175, 2 Am Dec. 264 (1805).

⁶ Bernard Rudden, ‘Tortiles’, (1991-1992) 6-7 *Tulane Civil Law Forum* 105, 110.

⁷ D.J. Ibbetson, *A historical introduction to the Law of Obligations* (1999) 57.

Early doubts started to emerge: would it really be possible to compare an abstract system of thought divorced from particular sets of facts, as the civil law is, to a bunch of inductive ideas capable of functioning only within limited factual spheres? Was it really going to be possible to compare a system capable of transcending disputes by moving away from factual immediacies to a technique of dispute resolutions?

Warning about the difficulties of comparative law, one of the greatest English comparatists, Professor Frederick Lawson, remarked how hard it is to comprehend the main subjects of just a single system of private law. He certainly was well aware of the enormous background that lies behind a comparative work and, most of all, the Herculean effort that it takes to anyone who has the courage or naivety to venture into the dense and trackless forest of a second system. Just as an experienced traveller contemplating a long and dangerous road that is as likely as not to take him to the right destination might reasonably refuse to leave home, the prospective obstacles of the comparison of the laws of different families are in such a big number and of such scaring dimension, that wisdom would advise to give up before even starting. At the same time, and perhaps for the same reasons, the challenge represented an irresistible temptation. It has been said that to learn another system of law is like learning another language and just as a person who is bilingual is much better able to appreciate the merits of the languages he speaks, the contrast between two systems, so different in their genius and their genesis like the common and the civil law, can certainly provide a much richer range of model solutions than they could possibly do on their own.

Although initially my intention was not to describe any specific national jurisdiction, but simply to contrast a set of prevailing attitudes, tendencies or currents of thoughts towards liability for non physical damage in the two main legal systems, soon this approach started to show its impracticability. Despite the strong forces tending to produce uniformity within each system, diversity exists and, on many occasions, the precise legal rules in force of particular jurisdictions differed so widely that it would be inaccurate to keep the assumption of monolithic, unified or homogeneous viewpoints and some necessary references to specific jurisdictions (in both systems) were finally made. Because of the major contribution that France and Germany have made to the civil law tradition and the intellectual leadership that both occupy in the civil law world, most of the time I have chosen those models as a representative, although partial expression, of the civil law perspective to each of the issues that were under scrutiny. In the common law, England, Australia, Canada and New Zealand are often subject of my attention.

The notion of ‘non physical damage’ as a unifying concept would probably not mean too much to a common law lawyer. By the same token, psychiatric harm and economic loss as particular types of damage with different applying rules would make many civilians to raise eyebrows in disbelief (or disdain). In the common law, the rules relating to the negligent infliction of non physical harm did not develop alongside the principles governing the negligent infliction of physical damage. The significant consequence of this peculiarity is that the nature of the injury suffered becomes a very important factor in determining the protective scope of the duty of care. To single out psychiatric harm and economic loss as self-contained categories represent an immediate need for creating special control factors, and this appears to be intrinsically associated with arbitrary and anomalous results. These two perplexing and difficult areas of the law seem in amazing contrast with the intriguing simplicity of the French system which approaches cases of non physical damage applying the same criteria as to any other tort claim.

In the first chapter, I analyze the law relating to the recovery of damages for psychiatric harm. I start the research in the common law where it unquestionably represents a very complex area of the law without apparent coherent background principles. In the second part, the research compares and contrasts the different (in some cases considerably different) approaches of several civil law jurisdictions with particular emphasis on French and German law.

In the second chapter, I examine the recoverability of economic loss. Out of its infinite variety of factual situations, I have chosen as a starting point for the analysis and discussion three of the main categories: misstatements, relational economic loss, and defective products or building structures. Following the same pattern as in the previous chapter, I discuss in the first place the approach taken in the common law, where the levels of complexity seem to be much higher.

Finally, the third chapter is reserved for the conclusions, stressing in particular the undeniable artificiality of the category, the excessive role attributed to policy and the relevant place that should be reserved for morality in the law of torts.

In retrospect, to choose non physical damage as the theme of my thesis was probably unwise for someone with no experience in the common law. Neither psychiatric damage nor economic loss has arrived at any fixed form; everything is highly ambivalent. The puzzles and anomalies that constantly surround them are certainly greater than in any other area of the law and they represented a permanent reminder of my lack of wisdom. Both psychiatric damage and economic loss are complex, vast and multifaceted issues. Both are of universal

scope. They count among those topics which universally create difficulties transcending the idiosyncratic formal-conceptual foundations of the various local systems. Both are placed at the very heart of tort liability and raise the most fundamental questions about the boundaries and frontiers of liability and private litigation. Be that as it may, I accepted the challenge. Whether I have succeeded or not is not for me to decide. However, what I would like to reinforce is that this is the look of a civilian, not a common law lawyer, and this naturally reflects, not only on the conclusions but also in the method, systematization, and even the style of analysing cases and over viewing of principles. For that, I ask the sympathy of the reader.

PART I: PSYCHIATRIC INJURY.

CHAPTER 1: THE COMMON LAW.

1.1 Introduction.

More than a century ago, Professor Bohlen said that perhaps upon no question has there been so much conflict in the decisions of courts of the higher authority as upon that of the right to recover for negligence which causes no direct physical impact, but where an appreciable physical injury ensues in consequence of a fright or nervous shock produced thereby.⁸ It is frustrating, if not depressing, that after more than a century the law relating to psychiatric harm still remains so inconsistent that it represents a constant source of strongly-held opinions. A respected commentator, whilst arguing that ‘this is the area in the law of torts where the silliest rules now exist and where criticism is almost universal’ suggested that liability in this area should be abandoned altogether.⁹ Among the judicial opinions, probably the most frequently cited is Lord Steyn’s who referred to the law governing compensation for psychiatric harm as a patchwork quilt of distinctions which are difficult to justify and where there are no refined analytical tools enabling the courts to draw lines by way of a compromise solution in a way which was coherent and morally defensible.

The common law has historically demonstrated a reluctance to consider emotional tranquility and psychic equilibrium as an interest worthy of extensive legal recognition and protection. Arguments of lack of precedent, difficulty of proof, fears of fraudulent and proliferation of claims, immeasurability of mental damages and potentially unlimited liability were some of the ways used by common law courts to express that reluctance to provide a remedy for emotional injury.¹⁰

Some early comments ventured to call that state of the law ‘naturally transitional rather than altogether unsatisfactory’.¹¹ Unfortunately, although some progress has been made

⁸ Francis H. Bohlen, ‘Right to recovery for injury resulting from negligence without impact.’ (1902) 50 *American Law Registers* 141.

⁹ J Stapleton, “In Restraint of Tort” in P Birks (ed) *The Frontiers of Liability* (1994) vol 2, 94-96.

¹⁰ John G. Fleming, ‘Distant shock in Germany (and elsewhere).’ (1972) 20 *American Journal of Comparative Law* 485. In its report *Liability for psychiatric illness*, the English Law Commission put forward six ‘policy arguments’ as being grounds for limitations of liability: the possibility of a flood of claims; the potential for frauds; the potential for conflicting medical opinions; the notion that psychiatric illness is not worthy of compensation; the notion that the plaintiff is only a *secondary* victim; the potential for litigation to affect prognosis. Law Commission n° 249 para 6.6.

¹¹ Hughes Parry, ‘Nervous shock as a cause of action in tort.’ (1925) 41 *Law Quarterly Review* 297, 297.

through the years, too many limitations on recovery still remain as ‘infirmities’ or expressions of ‘doctrinal fragility’¹² or as amounting to ‘a monument to its lack of maturity and confidence in this field’.¹³

The expression ‘*nervous shock*’, which was originally used to describe the mental distress negligently caused, is no longer in favour. Judges who have expressed disapproval for this term find it preferable to refer to *psychiatric damage*, or similar.¹⁴ The former expression more aptly describes the cause of the injury than the injury itself. Besides, the term itself tends to perpetuate the layman’s image of instant, momentary fright as constituting the central core of the subject, when such temporary shocks to the system are of marginal significance.¹⁵

In the past, it was generally contended that ‘mental pain or anxiety the law cannot value, and does not pretend to redress, when the unlawful act complained of causes that alone’.¹⁶ This statement was certainly the product of a time when medical science, especially psychiatric studies, was in its infancy. The courts regarded with suspicion complainants who experienced no physical injuries, but who maintained they suffered grievous emotional damage. There was no assurance that science could satisfactorily establish a cause and effect relationship between the injury and the incident which allegedly gave rise to it. In his judgment in *Coultas*¹⁷, Sir Richard Couch speaks of an express judicial distrust of the malingering plaintiff, and an implicit disbelief, of a medical charlatan who (as in the *Coultas* case itself) would furnish evidence to support him.¹⁸ Accordingly, modern cases rest on the principle that mental harm must result in an acknowledged medical condition, whether physical, such as a heart attack or miscarriage, or psycho-pathological, as with various neuroses, hysteria, schizophrenia or morbid depression.

¹² John G. Fleming. (1994) 2 *Tort Law Review* 202, 203.

¹³ Nicholas Mullany, ‘Psychiatric injury and communications of trauma’ in Mullany and Linden (Eds) *Torts Tomorrow. A tribute to John Fleming* (1998) 162, 164.

¹⁴ Kay Wheat, ‘Proximity and nervous shock.’ (2003) 32 *Common Law World Review* 313, 316. Bruce Feldthusen, *Economic Negligence. The recovery of pure economic loss*. (2000)

¹⁵ Harvey Teff, ‘Liability for negligently inflicted nervous shock.’ (1983) 99 *Law Quarterly Review*. 100, 107. In Australia, it has been suggested that ‘mental harm’ may become the preferred term, in view of its adoption by recent reform legislation enacted in all States and Territories.

¹⁶ Lord Wensleydale in *Lynch v. Knight* (1861), 9 H.L. Cas. 577 at 598. ‘Mere mental suffering, although reasonably foreseeable, if unaccompanied by physical injury, is not a basis for a claim for damages’ *Alcock v Chief Constable of South Yorkshire* [1992] 1 AC 310 per Lord Ackner at 401. ‘The law cannot compensate for all emotional suffering even if it is acute and truly debilitating.’ *White v Chief Constable of South Yorkshire* [1992] 2 AC 455 per Lord Steyn at 491.

¹⁷ *Victorian Railways Commissioners v Coultas* (1888) 13 App Cas 222.

¹⁸ Alan Sprince, ‘Negligently inflicted psychiatric damage: a medical diagnosis and prognosis.’ (1998) 18 *Legal Studies* 59, 60.

The reason for this is that, in the absence of physical injury, the requirement of a recognizable psychiatric illness, however imprecise the notion may be at the margin, appears to be a broadly effective deterrent to trivial claims as might otherwise be pursued.¹⁹ The courts seem to have been motivated by the belief that requiring physical consequences will verify the reality of trauma and make it easier to distinguish cases deserving of compensation.

1.2 Intentional infliction of mental suffering.

It is interesting to note that in England, liability for emotional distress was first recognized when inflicted intentionally.²⁰ Until the end of the 19th century, mental distress could not stand alone but had to be the result of the perpetration of some recognized wrong. Such damages, since they could not exist alone, but clung onto the main award for the substantial tort involved became known as *parasitic*,²¹ properly a ground for denigrating claims for psychiatric injury.²² A court would feel comfortable awarding damages for any mental distress suffered in addition to damages for the violation of the major interest protected by the tort, because the fact that the tort had been committed was a guarantee of the genuineness of the claim.²³ That way the courts were also dealing with familiar territory: construing the relevant damage as physical injury²⁴ rather than mental injury meant that compensation was awarded for damage about which there could be no disagreement.²⁵

In 1897, the English Court of Appeal had to deal again with the issue of nervous shock which did not follow upon physical impact. The defendant, Downton, as a practical joke, told Mrs. Wilkinson, the plaintiff, that her husband was smashed up in an accident and that he was lying with both legs broken. The effect of this false story on the plaintiff was a violent shock

¹⁹ Teff, above n 8, 105.

²⁰ S.K. Parmanand, 'Intentional infliction of emotional distress – A neglected delict' (1984) 101 *South African Law Journal* 171,173. Apparently *I de S et ux v. W de S* (Y.B. Lib. Ass., f. 99, pl 60 (1348) was the first case recognizing a mental, as distinct from a physical injury. It concerned a tavern-keeper's wife who avoided a hatchet thrown at her by an irate customer.

²¹ Lord Denning MR has expressed dislike for the expression because 'it conveys the idea of damages which ought not in justice to be awarded, but which somehow or other have been allowed to get through by hanging on to others.' *Spartan Steel & Alloys Ltd. V. Martin & Co. (Contractors) Ltd.* [1973] QB 27 at 35.

²² Des Butler, 'Psychiatric injury resulting from negligence' (2002) 10 *Torts Law Journal* 13, 19.

²³ Peter R. Handford, 'Intentional infliction of mental distress: Analysis of the growth of a tort' (1979) 8 *Anglo-American Law Review* 1, 3.

²⁴ Professor Goodhart argues that, technically, trespass to the person involved some physical impact. This physical impact having been established, the court never had any difficulty in recognising that pain and suffering could constitute an element of damage, but in the absence of physical impact, it was more difficult to determine what tort had been committed merely by giving a mental shock to another. A.L. Goodhart, 'The shock cases and area of risk' (1953) 16 *Modern Law Review* 14, 16.

²⁵ Des Butler, 'Identifying the compensable damage in 'nervous shock' cases' (1997) 5 *Torts Law Journal* 70.

to her nervous system, producing vomiting and other more serious and permanent physical consequences at one time threatening her reason and entailing weeks of suffering and incapacity.²⁶

Naturally, in a case as such, where the elements of moral blame and outrage associated with the intentional infliction of emotional distress were present, the damage award seems to be more punitive than compensatory and the question whether the defendant owed a duty to the particular plaintiff of secondary importance.²⁷

Wright J. held that the defendant's act was plainly calculated to produce some effect of the kind which was produced, namely nervous shock. In an effort to avoid the outcome of the Privy Council's decision in *Coultas* a new innominate tort was created: a cause of action on the case for damages for intentional infliction of nervous shock. In order to succeed, a plaintiff had to establish that the defendant intended to inflict harm in the form of physical injury or nervous shock, and that he had, in fact, suffered the kind of harm which the defendant intended.

An interesting question might arise in a case where the facts were identical with those in *Wilkinson v. Downton*²⁸ except that the words were true. It is conceived that in those circumstances, the decision would be different –there would be no right to recover. Magruder states that normally, a person's purpose in breaking bad news to another is not the desire to cause mental distress, but rather to let the other person know something he is entitled to know. The question is, he adds, whether the law should recognize a duty of care to convey bad news tactfully so as to minimize the risk of physical consequences from sudden shock. He concludes that, in the absence of authority on the point, it may be surmised that such a duty would be recognized only in a very extreme case.²⁹

In a recent case,³⁰ the House of Lords analysed whether there is scope for the application of the *Wilkinson v Downton* principle in other circumstances. The plaintiff, Alan Wainwright, suffered humiliation and distress as the result of being strip-searched while

²⁶ *Wilkinson v. Downton*. [1897] 2 QB 57. See also *Janvier v. Sweeney* [1919] 2 KB 316 (C.A.) where the defendant, a private detective, in order to coerce a female servant into giving him access to certain letters in possession of her mistress, accused her of being associated with a German spy and threatened her with arrest; he was held liable for her illness resulting from nervous shock.

²⁷ David Leibson, 'Recovery of damages for emotional distress caused by physical injury to another'. (1976-1977) 15 *Journal of Family Law* 163, 166. For a general discussion of the distinction drawn between intentional and negligent infliction of emotional distress, and how the element of moral culpability plays a part in the distinction, see Millard, 'Intentionally and negligently inflicted emotional distress: toward a coherent reconciliation.' (1982) 15 *Indiana LawReview*, 617, 623-625.

²⁸ [1897] 2 QB 57.

²⁹ Calvert Magruder, 'Mental and emotional disturbance in the law of torts' (1935-1936) 49 *Harvard Law Review* 1033, 1045.

³⁰ *Wainwright v Home Office* [2004] 2 AC 406 (HL).

visiting a relative in prison. Although the conduct of the prison officers in requiring the plaintiff to undress was in good faith, it was not protected by statutory authority. The questions for the House of Lords were whether damages were recoverable by the plaintiff for the tort of invasion of privacy or under an extension of the referred principle (the plaintiff's argument being that the prison officers' conduct was calculated to cause him distress).

Lord Hoffmann, with whom the other members of the House of Lords agreed, after discussing *Wilkinson v Downton* and later developments held that it did not provide a remedy for distress which did not amount to psychiatric injury. In any event, there was no actual intent (imputed intent being insufficient in this context) on the part of the prison officers to cause distress to the plaintiff.

Even on the basis of a genuine intention to cause distress, Lord Hoffmann said he would wish to reserve his opinion on whether compensation should be recoverable. He maintained that in institutions and workplaces all over the country, people constantly do and say things with the intention of causing distress and humiliation to others. This shows lack of consideration and appalling manners, but he was not sure that the right way to deal with it was always by litigation.

In his opinion, therefore, the claimants could build nothing on *Wilkinson v Downton*. It did not provide a remedy for distress which did not amount to recognised psychiatric injury and so far as there may be a tort of intention under which such damage is recoverable, the necessary intention was not established.

It has been submitted that the decision in *Wainwright* suggests that the rule in *Wilkinson v Downton* very doubtful has a useful role to play in contributing to the coherent development of the law.³¹

1.3 The impact theory of recovery: the *Coultas* case.

The first recognized theory to deal with mental distress was grounded on the untenable belief that emotional damage could only be expected to occur as a result of a person's physical injuries, and that mental trauma alone could not serve as a basis for recovery.³² The test was arbitrary, without any rational foundation and tended to lead to unjust and

³¹ Stephen Todd, *The law of torts in New Zealand* (2009) 129.

³² It generally is considered that the Privy Council adopted what has since been referred to as the 'impact rule' under which a plaintiff cannot recover for mental distress in the absence of direct physical impact upon him. While *Coultas* is often cited as the first case to utilize the impact rule there is reason for denying that interpretation since the issue of impact was not actually decided.

incongruous decisions.³³ The impact rule, for example, would exclude liability from a defendant who was fortunate enough not to hit the plaintiff but whose negligent *near miss* caused the plaintiff to suffer nervous shock and a resulting miscarriage.

It has been suggested that Oliver W. Holmes might have contributed to revitalize the theory providing a new rationale based upon notions of practicability. In effect, in a well-known case at the beginning of the twentieth century, he found that the reason for the impact rule was to separate genuine from fraudulent claims, not to separate the physical from the mental. The requirement of an impact was said to function as some guarantee of genuineness.³⁴

A crossing accident in Australia in 1886 set the opportunity for the Privy Council to decide the question. James Coultas, his wife Mary and her brother, driving their horse cart from Melbourne to Hawthorne had the most frightful experience when a negligent gatekeeper allowed them to cross a railway line when the train was coming. The shock of the onrushing train scraping their wheels made Mrs. Coultas have a miscarriage. When sued, the Railway Company argued that Mrs. Coultas had suffered no actual physical injury, which was a standard requirement for personal injury cases.

The Privy Council, speaking through Sir Richard Couch, held that damages arising from mere sudden terror unaccompanied by any actual physical injury, but occasioning a nervous or mental shock, could not under such circumstances be considered a consequence which, in the ordinary course of things, would flow from the negligence of the gatekeeper. In the opinion of the Lordships, 'it would be extending the liability for negligence much beyond what that liability has hitherto been held to be.'³⁵

In addition, they said that if the plaintiff were allowed to recover, then

not only in a case like the present but in every case where an accident caused by negligence had given a person a serious nervous shock, there might be a claim on account of mental injury. The difficulty which now often exists in case of alleged physical injuries of determining whether they were caused by the negligent act would be greatly increased, and a wide field open for imaginary claims.³⁶

³³ However, in the United States, after New York became the first state in the Union to adopt it (*Mitchell v Rochester R.R. Co.* 151 N.Y. 107, 45 N.E. 354 (1896) favorably citing *Coultas*) many other jurisdictions followed the path, making the impact rule the most accepted theory of the top industrial states in the early twentieth century. John Burley, 'Dillon revisited: towards a better paradigm for bystander cases' (1982) 43 *Ohio State Law Journal* 931, 933.

³⁴ Troy A. Tureau, 'Bystander recovery for negligent infliction of emotional distress. Louisiana enters the 20th century' (1992) 37 *Loyola Law Review* 1005, 1008. David Lenox, 'Negligent infliction of emotional distress – Should the Florida Supreme Court replace the impact rule with a foreseeability analysis?' (1983) 11 *Florida State University Law Review* 229, 233.

³⁵ At 225.

³⁶ At 227.

There was no reference to the defendant's contention that there had to be impact in the shape of some contemporaneous physical injury. However, the reference to 'mere sudden terror unaccompanied by any actual physical injury', has been interpreted as indirectly responding that issue.³⁷

The Court decided the case strictly on the basis of remoteness of damage according to the prevailing technique of the time for limiting defendant's liability. However, if remoteness means the absence of direct and natural causal sequence, of a natural or necessary descent from the wrong to the damage,³⁸ then, it is not clear why fright from a collision with a locomotive was not expected in the ordinary course of things. Apparently, the court seemed to think that Mrs. Coultas' injuries were more extensive than might reasonably be expected. Their definition of remoteness did not reflect temporal or spatial distance between the defendant's negligence and Mrs. Coultas' injuries. Rather, it classified her injury as remote because of its judgment that a normal person would not suffer physical injuries as a result of such an incident. It therefore, used remote to mean abnormal or unusual.³⁹ It has been submitted that this focus on the personal characteristics and response of the plaintiff introduced gender into the case in an unsubtle way. It was Mary Coultas who fainted and suffered the physical effects of nervous shock, not her brother or her husband, although they also were exposed to the same danger.⁴⁰

Naturally, the fright was not the ground of the action, but the physical injury (the miscarriage). The fright was only alleged (and proved) as a necessary link in the chain of causation between the wrong and the damage. It was clear that the plaintiff was trying to recover for the consequences of the fright and not the fright in itself; but the court maintained that the basis was fright, and that if no recovery could be had for fright it was hard to see how there could be recovery for its consequences.

No doubt, the decision reveals awareness of the reports from the Royal Commission on Railways (1867), and from the Select Committee of the House of Commons on Railways (1870) showing concerns about a crisis in personal injury compensation relating to sums paid out in damages by railways companies in the middle of the nineteenth century. The policy consideration expressed the Court's conviction that extending the liability of negligent

³⁷ James A. Rendall, 'Nervous shock and tortious liability' (1960-1963) 2 *Osgoode Hall Law Journal* 291, 296.

³⁸ Bohlen, above n 1, 165.

³⁹ Martha Chamallas and Linda Kerber, 'Women, mothers, and the law of fright: a history.' (1989-1990) 88 *Michigan Law Review* 824.

⁴⁰ *Ibid.* 827.

defendants to cover the medical sequelae of non-physical impact trauma would escalate the problem.⁴¹

It has been suggested that, in *Coultas*, the Court found a reason of public policy and, from there, intended to construct substantive law by means of elevating an evidentiary issue (as the type of injury) to the status of substantive law. Palles CB, the greatest of Irish 19th century judges, as he has been called⁴², also pointed out that since the damage is the gist of negligence, the existence and potential compensability of nervous shock should be regarded as an evidentiary rather than a substantive issue.

I am of opinion that as the relation between fright and injury to the nerve and brain structures of the body is a matter which depends entirely upon scientific and medical testimony, it is impossible for any Court to lay down, as a matter of law, that if negligence cause fright, and such fright, in its turn, so affects such structures as to cause injury to health, such injury cannot be a consequence which, in the ordinary course of things would flow from the negligence, unless such injury accompany such negligence in point of time.⁴³

The *Coultas* case was received with little enthusiasm, and, as it was a decision of the Privy Council, it has never been regarded as binding in the English courts.

In the United States, the inequities of the impact requirement soon started to show and some courts tried to get round it by holding that even the most trivial contact constituted impact. But, while recovery was granted for such trivial impacts, serious emotional harm with consequent physical damage would often go uncompensated because the negligent conduct causing the mental distress failed to produce any impact. The rule was first abolished in Texas in 1890, being gradually followed by other jurisdictions.

1.4 The *zone of danger* approach.

The first case in England recognizing liability for negligent infliction of emotional distress was *Dulieu v White & Sons*.⁴⁴ Mrs. Dulieu was a pregnant publican's wife who was working cleaning glasses behind the bar when a horse drawn van, driven by one of the defendant's servants, crashed through the window of the public house. Mrs. Dulieu was not physically injured but suffered from nervous shock. Following this incident Mrs. Dulieu

⁴¹ Danuta Mendelson, *The interfaces of the liability for negligently caused psychiatric injury (nervous shock)* (1998) 63. American commentators point out how the courts over there also noted the public concern of imposing liability on the railroad industry, of such great importance to the nation at the time. Tureau, above n 27, 1016.

⁴² Ronan Keane, 'Judges as Lawmakers—The Irish experience' (2004) *Judicial Studies Institute Journal* 1, 7.

⁴³ *Bell v The Great Northern and Western Rly. Co.* (1890) 26 LR Ir at 441.

⁴⁴ [1901] 2 KB 669.

prematurely delivered a disabled child. She recovered damages for her own illness or ‘*shock*’, which involved real and immediate fear of injury.

In ruling for the plaintiff, the Court set two conditions: First, the plaintiff’s mental distress had to be accompanied by a physical manifestation (the miscarriage, in this case); second, the plaintiff needed to establish that her shock resulted from fear for her own safety.

It is apparent that in *Dulieu v White & Sons*⁴⁵ the Court sought to control the scope of liability by using what became known as the ‘zone of danger rule’, according to which a plaintiff would be allowed to recover for psychiatric illness provided that this was caused by reasonable fear of being physically injured by the defendant’s negligence. This meant that damages were only to be awarded if the claimant was either within or geographically close enough to the foreseeable area of impact.⁴⁶

After conceding that a claim based on damage from emotional shock would be sustainable in negligence, Kennedy J. seemed to have felt that the door must not be open too wide and added:

It is not, however, to be taken that in my view every nervous shock occasioned by negligence and producing physical injury in the sufferer gives a cause of action. There is, I am inclined to think, one limitation. The shock, where it operates through the mind, must be a shock which arises from a reasonable fear of immediate personal injury to oneself.⁴⁷

Thus was born the notion of the ‘ambit of physical risk’ that has so plagued later courts.

Another aspect of Kennedy J.’s judgment that merits consideration is that he rejected the argument that the plaintiff should be denied recovery when it is shown that she is particularly susceptible of emotional upset (as when she is pregnant) and would probably not otherwise suffer injury, at least to the same extent. To support his position he cites the doctrine of the thin-skulled man.

It is interesting to note that the remoteness argument was rejected by Phillimore J. in these words: ‘the difficulty of those cases is to my mind not one as to the remoteness of the damage, but as to the uncertainty of there being any duty.’⁴⁸

The Kennedy limitation has been described as ‘empirical’ and ‘pragmatical’ rather than ‘logical application of principles.’⁴⁹ The ‘zone of danger’ test provides recovery where the

⁴⁵ [1901]2 KB 669.

⁴⁶ Trevor Hicks, *Post traumatic stress disorder and the law* (2003) 28. Indeed, those outside the zone of danger of physical harm could not recover for such harm even if they did suffer it. They were not foreseeable, and under the usual rule, would not be able to satisfy the proximate cause requirement. This was the point of Cardozo’s opinion in *Palsgraf v Long Island R.R.* although he used the language of duty.

⁴⁷ At 681.

⁴⁸ At 685.

impact rule would not; however, its admittedly arbitrary limits have likewise resulted in denial of recovery for deserving plaintiffs.⁵⁰ Although the ‘zone of danger’ test provided a convenient and relatively simple way of limiting a defendant’s liability, the deficiencies were clear, and its critics soon showed that it would permit recovery for a mother, ‘timid and lacking in the motherly instinct’, who feared only for herself, while withholding damages from another mother situated beside her, ‘courageous and devoted to her child’, who worried only about her child, and not at all for herself. The application of the rule under these circumstances would be quite arbitrary and would create the very evil the test was designed to eliminate.

It took a quarter of a century for the courts in England to overthrow the Kennedy restriction, and in some jurisdictions even longer.⁵¹

1.5 Fear of peril or harm to others.

In 1925, in *Hambrook v. Stokes Bros.*⁵² the English Court of Appeal allowed for the first time recovery in a situation in which the plaintiff, safely outside the area of possible impact suffers psychiatric damage through fear that another has been, or may be killed, injured, or put in peril. The plaintiff sued for the death of his wife, pregnant at the time, caused by the negligence of the defendants who had left a lorry with its engine running at the top of a hill, and facing a narrow street. Her three children had just walked up the same street

⁴⁹ Windeyer J. in *Mount Isa Mines Ltd. v. Pusey* (1971), 45 A.L.J.R. 88 at 97.

⁵⁰ Mark Beede, ‘Duty, foreseeability, and the negligent infliction of mental distress.’ (1981) 33 *Maine Law Review* 303, 313.

⁵¹ In Scotland, the first case to depart from the *Dulieu v. White & Sons* limitation was *Mc Linden v. Richardson* (1962) S.L.T. In South Africa, it was only in 1973, in *Bester v. Commercial Union*, that the Appellate Division abandoned the restriction. In that case, two young brothers ran over a street. One of them was hit by a vehicle and died the following day. The other one, who was just ahead his brother when the accident happened, sustained serious emotional shock. Tager considers that one of the reasons for the restrictive and narrow attitude of their law towards nervous shock is the conservatism of South African law, which regards the principles applicable to the Aquilian action as the only principles applicable to nervous shock. – an approach that restricts development and the study of the law of other jurisdictions. Louise Tager, ‘Nervous shock in South African Law.’ (1972) 89 *South African Law Journal*, 436. *Bester*’s case received favourable comment, primarily for ridding South African law of the artificial constraints inherited from English law; J.R. Midgley, ‘The role of foreseeability in psychiatric injury cases.’ (1992) 55 *Tydskrift vir Hedendaagse Romeins Hollandse Reg*, 441. Prior to *Bester*, the South African law of delict lacked clear principles in the field of psychiatric injuries. Since Roman-Dutch authority was scant, the courts consistently sought guidance from English law as far as the negligent infliction of emotional shock was concerned; Johann Neethling, ‘Delictual liability for psychological lesions in South African law’ in Ulrich Magnus and Jaap Spier (Eds) *European Tort Law* (2000) 211.

In the United States, the Kennedy limitation was set aside in 1968 in California for the first time in *Dillon v. Legg*. At the present time, the picture is one of astonishing divergence. See Douglas B. Marlowe, ‘Negligent infliction of mental distress: A Jurisdictional survey of existing limitation devices and proposal based on analysis of objective versus subjective indices of distress’. (1988) 33 *Villanova Law Review* 781, 817.

⁵² [1925] 1 KB 141.

in the direction from which she saw the lorry appear out of control and swaying from one side of the street to the other. The lorry stopped before it could reach her as a result of the collision with a building not far from where she was standing. Although she could not see what happened to her children (because the street took a bend at the end) she feared the worst, immediately rushing to the scene, where bystanders informed her that a child matching her daughter's description had been struck. Mrs. Hambrook, who was pregnant at the time, suffered a miscarriage three months later and died. Her husband sued under the Fatal Accidents Act for the death of his wife caused by the negligence of the defendant.

The court had to consider whether they could widen the scope of the duty owed, which, in accordance with *Dulieu v. White*,⁵³ did not extend beyond fear for oneself.⁵⁴

It is relevant to point out that, although the woman had not seen herself the lorry running over her children (all that she saw was the lorry turning the bend and running into a wall) 'the shock resulted from what the plaintiff's wife either saw or realized by her own unaided senses, and not from something which some one told her.'⁵⁵ Emphasis was given to two elements: *presence* at the scene of the accident and *perception* of it with one's own unaided senses (as opposed to being informed by someone else).

It was not necessary for a person to fear merely for his own or her own safety. Concerns were expressed that a mother who feared for her child should not be disadvantaged simply because she was not close enough to the incident to fear for herself. Bankes L.J. held that it was a normal consequence of the defendant's negligence that a mother, knowing that her children were in such peril, would receive a shock, and that this was sufficient for the purpose of the action. He did not discuss the question whether or not the woman was within the area of physical risk, as the defendant admitted negligence on this point. Atkin, L.J. said that to hinge recovery on the speculative issue whether the parent was shocked through fear for herself or for her children 'would be discreditable to any system of jurisprudence.'⁵⁶

Atkin L.J. apparently thought some emphasis was necessary on the matter: 'I agree', he said, 'that in the present case, the plaintiff must show a breach of duty to her, but this he shows by the negligence of the defendants in the care of their lorry.'⁵⁷ It has been suggested that he reached his conclusion on the ground that the plaintiff's wife was within the area of physical risk, but it does not follow from this that he would have held that the area of

⁵³ [1901] 2 KB 669.

⁵⁴ Wheat, above n 7, 313, 318.

⁵⁵ [1925] 1 KB at 152.

⁵⁶ At 157.

⁵⁷ Ibid. at 156.

emotional risk was insufficient for this purpose if the question had fallen for decision.⁵⁸ In fact, it is not even clear whether the mother was actually subject to physical danger herself as the runaway lorry might not have been able to take the curve. Some commentators state that, in fact, she was not in personal danger. Others, however, argue that Mrs. Hambrook was not to know that the lorry would collide with a building before it could reach her, and that the facts suggest that she had all the reasons to be in immediate fear for her own personal safety, and that this situation could have been foreseen.⁵⁹ Rendall, pointing out the fact that the mother did not actually see the accident,⁶⁰ states that ‘this oddity becomes the more baffling in light of Bankes L.J.’s remarks that the shock must result from what the mother saw or realized by her own unaided senses.’⁶¹ The Court was in fact indirectly recognizing that the zone of danger could not be defined merely by the risk of physical injury, and that it had necessarily to be extended to the area of those exposed to emotional injury.

Anyhow, the question in issue, as Professor Goodhart points out, was not as to the probable or improbable consequences of an admitted breach of duty to use care, but as to the extent of the duty itself.⁶² The plaintiff was suing for the breach of an independent duty owed to herself. The same act may constitute a breach of two distinct duties owed to two different persons. In that sense, *Hambrook v. Stokes*⁶³ offered opportunity for a wide extension of liability to bystanders.

1.6 Foreseeability of the plaintiff.

In 1943, in what Professor Wright called one ‘of the most important decisions in the law of tort which has appeared since *Donoghue v. Stevenson*’⁶⁴, the question of nervous shock reached the House of Lords for the first time. In *Bourhill v. Young*⁶⁵ an eight month pregnant fishwife, descended from a tram some twenty metres from a road junction. She walked around to the driver’s platform to collect her fish basket. While she was picking up

⁵⁸ Goodhart, above n 17, 18. There is considerable doubt whether the issue was one of duty or remoteness. Atkin L. J. said that ‘the question appears to be as to the extent of the duty, and not as to remoteness of damage’ [1925] 1 KB 141 at 158

⁵⁹ J. Havard, ‘Reasonable foresight of nervous shock’. (1956) 19 *Modern Law Review* 478, 486.

⁶⁰ Sargant L.J. was of the opinion that the injuries did not result from something she saw. He supported his opinion by reference to the evidence that the woman was concerned about her daughter solely, though all three children were out of her sight and equally likely to have been injured. This he took to be evidence that she was really upset by what witnesses of the accident told her.

⁶¹ Rendall, above n 30, 294.

⁶² Arthur L. Goodhart, *Essays in Jurisprudence* (1931) 116.

⁶³ [1925] 1 KB 141.

⁶⁴ Cecil A. Wright, ‘Comment. Duty of care. Nervous shock.’ (1943) 21 *Canadian Bar Review* 65.

⁶⁵ [1943] AC 92.

the basket, a motorcyclist, riding at an excessive speed, passed on the opposite side and collided with a car at the intersection. She could not see the impact, but heard a loud noise of a collision. After the cyclist's dead body had been removed, she saw blood on the road.⁶⁶ She claimed that as a result she suffered a severe shock to her nervous system and one month later gave birth to a stillborn child..⁶⁷

The progress since 1888 was significant if it is considered that every member of the House of Lords, without hesitation, accepted that

the crude view that the law should take cognizance only of physical injury resulting from actual impact has been discarded, and it is now well recognized that an action will lie for injury by shock sustained through the medium of the eye or the ear without direct contact.⁶⁸

The second aspect to note is that the question was approached from the standpoint of duty, and not remoteness as in the *Coultas* case. Three of the judgments (Lord Thankerton, Lord Russell of Killowen, and Lord Macmillan) were based on the ground that because the bystander was outside of the ambit of ordinary physical impact, the defendant owed no duty of care to her. This seems to indicate that only persons who were within the range of foreseeability of harm likely to be caused in the normal manner by physical impact have any hope of basing a claim for injury resulting through nervous shock.⁶⁹ Because the plaintiff was outside the area in which it was reasonable to foresee that she might be physically injured, and therefore, no duty was owed to her, the central issue, whether she could have recovered for shock if she had been standing within that area, remained open. Although *Hambrook v. Stokes Brothers* was discussed by their Lordships, no definite conclusion was reached.

It has been submitted that the decision is not very helpful in articulating the boundaries of liability and is best regarded as dealing with the question of whether a road user owes a duty of care not to cause shock to a bystander who has no connection with the victim of the accident rather than as denying the possibility of the thin skull rule applying to cases in which a duty of care not to cause shock does exist.⁷⁰

⁶⁶ It seems that Mrs. Bourhill's shock came from the initial bang, rather than from the sight of what she saw, although she gave contradictory evidence about this. William W. McBryde, 'Bourhill v Young: the case of the pregnant fishwife' in Miller and Meyers (Eds.) *Comparative and historical essays in Scots Law* (1992) 70.

⁶⁷ A parallel tragedy, generally unknown because irrelevant to the case, is that the tramcar driver, whom nobody could blame for the accident, was much affected by it. He spoke about it frequently. He was agitated by the thought of giving evidence in the court proceedings. He was found dead in Holyrood park on april 1939, having committed suicide by the consumption of lysol (a poisonous disinfectant). McBryde, *ibid* 71.

⁶⁸ Per Lord Macmillan.

⁶⁹ McBryde above n 59, 71. It should be noted that the duty of owners of motor vehicles usually was stated in very general terms in relation to persons on the highway. In *Bourhill*, however, the test of duty was almost exclusively limited to the question of physical impact.

⁷⁰ K. M. Stanton, *The modern Law of Tort* (1994) 207.

Mendelson states that there should have been only one issue before the House of Lords, namely, whether in the circumstances of the case, on the test of reasonable foreseeability, the motorist owed Mrs. Bourhill a duty of care, irrespective of the nature of her injury. The House of Lords, however, coupled that with the issue of remoteness of damage and asked whether the scope of reasonable foreseeability as the test for the existence of duty of care should extend to the foreseeability of risk of nervous shock at the stage of remoteness of damage.⁷¹

In *Bourhill v. Young*⁷² the same conclusion was reached both by ‘the area of physical impact’ test and by ‘the reasonable foresight of shock’ one, but no doubt in other cases the difference between them may be extremely significant.⁷³ The way in which the issue was approached raises the question: if the cause of action is damage due to the unlawful infliction of shock, why should the area of possible physical injury be relevant? Goodhart points out that the emphasis on physical tests is related to the nineteenth century desire to equate the law with the physical sciences. After stating that all such tests have proved illusory, he concludes that the measure of legal responsibility must still depend on a value judgment and that this cannot be answered satisfactorily by measuring the number of yards which separate the defendant from the person who has suffered an injury from his act.⁷⁴

Professor Wright, in a well-known comment shows that, even if Cardozo C.J.’s judgment in *Palsgraf v. Long Island Railway Company*⁷⁵ is not mentioned in any of the judgments, there can be little doubt that the similarity of approach is more than a coincidence and, indeed, some of the language used in the case gives evidence of stemming directly from that decision.⁷⁶ The Court clearly accepted the doctrine held in that famous case that negligence is a relative term; that it is not enough for the plaintiff that the defendant’s conduct was negligent towards somebody else; that the defendant’s conduct must have been negligent with relation to the legally protected interests of the plaintiff.

Foreseeability, no doubt, is in the core of Lord Thankerton’s decision:

⁷¹ Mendelson, above n 34, 145.

⁷² [1943] AC 92.

⁷³ On the contrary, Goodhart believes that the case was decided not on the ground that the plaintiff was outside the area of risk, but on the ground that it was not reasonably foreseeable that an ordinary person would receive a shock of such magnitude as to cause illness from such an incident. He also believes that the area of physical risk doctrine is not necessary for the purpose of enabling the courts to reject extravagant claims. The ordinary reasonable foresight doctrine, he says, will give sufficient protection in such cases. Goodhart, above n 17, 19.

⁷⁴ *Ibid.*, 23.

⁷⁵ 248 N.Y.339, 162 N.E. 99 (1928).

⁷⁶ Wright, above n 57, 65.

The risk of the bicycle ricocheting and hitting the appellant, or of flying glass hitting her, in her position at the time, was so remote, in my opinion, that the cyclist could not reasonably be held bound to have contemplated it...⁷⁷

Lord Russell of Killowen also referred to foreseeability:

In considering whether a person owes to another a duty a breach of which will render him liable to that other in damages for negligence, it is material to consider what the defendant ought to have contemplated as a reasonable man.

And then in transparent Cardozo's language:

The first essential for the appellant to establish is the existence of a duty owed to her by John Young of which he committed a breach. As between John Young and the driver of the motor-car, John Young was admittedly negligent, in that he was in breach of the duty which he owed to him of not driving, while passing the stationary tramway-car, at such a speed as would prevent him from pulling up in time to avoid a collision with any vehicle which might come across the front of the tramway-car from Colinton Road into Glenlockhart Road, but it by no means follows that John Young owed any duty to the appellant.⁷⁸

In Lord Macmillan's speech the memory of the *Palsgraf* case could not be more fresh:

In the present instance the late John Young was clearly negligent in a question with the occupants of the motor-car with which his cycle collided. He was driving at an excessive speed in a public thoroughfare and he ought to have foreseen that he might consequently collide with any vehicle which he might meet in his course, for such an occurrence may reasonably and probably be expected to ensue from driving at a high speed in a street. But can it be said that he ought further to have foreseen that his excessive speed, involving the possibility of collision with another vehicle, might cause injury by shock to the appellant?⁷⁹

The results reached by these judgments seem to indicate that, as the appellant was outside the area in which it was reasonable to foresee that she might be physically injured, the cyclist owed her no duty of care. None of them was concerned with the question of shock at all. The question whether Mrs. Bourhill could have recovered for the shock she suffered if she had been standing within that area was left open.

Lord Porter said that 'in order to establish a duty towards herself, the appellant must still show that the cyclist should reasonably have foreseen emotional injury to her as a result of his negligent driving...' It is significant to point out that the foresight required by Lord Porter is foresight of emotional injury which, naturally, is not the same thing as foresight concerning physical injury (although in many cases they coincide).

In *King v Phillips*⁸⁰ a mother looking out of a window saw a taxi, some 70 yards away, backing slowly onto her son on a tricycle. She heard her son scream, but his injury was so

⁷⁷ Per Lord Thankerton at 99.

⁷⁸ At 102.

⁷⁹ At 105.

⁸⁰ [1953] 1 QB 429, [1953] 1 All ER 617 (C.A.)

slight that he was able to run home. Nonetheless she suffered psychiatric injury as a result of the shock.

The Court of Appeal affirmed the judgment of McNair J. who had held that there had been no duty. According to him, the mother

was wholly outside the area or range of reasonable anticipation and it would be contrary to common sense to say that a taxicab driver ought reasonably to have contemplated that, if he backed his taxi without looking where he was going, he might cause injury by shock, or any other injury, to a woman in a house some 70 or 80 yards away up a side street.⁸¹

Goodhart argues that if the cause of action is damage due to the unlawful infliction of a shock, there is no reason why the area of possible physical injury has to be relevant. He attributes the confusion between foresight of emotional injury and foresight of physical injury to the fact that, before the emotional injury was recognized as a separate tort, it was given recognition only as a type of damage resulting from physical injury. In these cases, shock followed the physical injury, while in the cases concerning psychiatric injury, physical injury follows the shock. He suggests that, although there is an obvious and fundamental difference between the two, nevertheless it has been difficult for the courts to rid themselves of the idea that in some way or other the shock which the person has suffered must be connected with some pre-existing physical injury or danger to himself.⁸²

Singleton LJ remarked that the driver could not reasonably or probably anticipate that any injury, either physical or from shock, would be caused to the mother. He also stated that the driver owed a duty to the boy, but he knew nothing of the mother; she was not on the highway; he could not know that she was at the window, nor was there any reason why he should anticipate that she would see his taxicab at all; he was not intending to go into Birstall Road except for the purpose of turning. He concluded that the fact that she saw the tricycle under the taxicab did not enable one to distinguish that case from *Hay (or Bourhill) v Young*.⁸³

It has been suggested that if it is to be admitted that a woman can reasonably be expected to suffer nervous shock as a result of apprehension for the safety of her child (and Singleton L.J. seems to admit this), it is difficult to see how her distance from the accident

⁸¹ [1952] 2 All ER at 461.

⁸² Goodhart, above n 17, 22.

⁸³ [1953] All ER at 620.

can qualify this foresight, providing she is in a position to appreciate the nature and quality of the immediate threat to her child.⁸⁴

Denning L.J. declared himself unable to see any reason for applying a different test to determine liability for nervous shock injury than the one applied to settle liability for injury through physical contact. He suggested that the test is simply foreseeability of injury and if injury does occur then the defendant is liable unless the injury is too remote. He approved the *Hambrook* case which he found exactly similar except in one respect. The crucial difference, in his opinion, was ‘that the slow backing of the taxicab was very different from the terrifying descent of the runaway lorry.’

It is difficult to see the justification for this distinction in foresight, as in either case it is the potentially damaging effect of immediate fear for the child which is in issue, and this would be the same in each case. Goodhart has pointed out the weakness of this conclusion, stating that it is not immediately obvious why a mother should receive less of a shock when she sees her child being slowly run over, than when it is done rapidly.⁸⁵

Lord Justice Denning founded his decision on foresight but he employed remoteness analysis rather than the duty language used in *Bourhill v. Young*.⁸⁶ ‘I think’, he said, ‘the shock in this case is too remote to be a head of damage’.⁸⁷

It has been submitted that Lord Denning’s approach in this case may seem like a relic of a bygone era.⁸⁸ Singleton LJ and Hodson LJ did not share his view and, applying the principle of *Bourhill v. Young*⁸⁹, held that the taxi driver could not reasonably have contemplated that as a result of his negligence in reversing his taxi without looking where he was going he would cause psychiatric injury to the mother 70 yards away. The most relevant aspect of Lord Denning’s influential judgment, though, is that he states that the test of liability for nervous shock is foreseeability of injury by nervous shock.⁹⁰

Although *King v Phillips*⁹¹ is considered one of the cases which displayed some shift of emphasis towards concern with the area of emotional shock, physical proximity continued to

⁸⁴ Havard, above n 52, 494. In the *King* case the mother, although at a considerable distance, both heard and saw the accident which threatened the life of her son. She was, therefore, more closely connected emotionally with the accident than was the mother in the *Hambrook* case, although she herself was never in any physical danger as the latter may have been.

⁸⁵ Arthur L. Goodhart, ‘Emotional shock and the unimaginative taxicab driver’. (1953) 69 *Law Quarterly Review* 352.

⁸⁶ Allen M. Linden, *Canadian Tort Law* (2001) 392.

⁸⁷ At 624.

⁸⁸ Nicholas Mullany and Peter Handford, *Tort Liability for Psychiatric damage* (2006) 107.

⁸⁹ [1943] AC 92.

⁹⁰ At 441.

⁹¹ [1953] 1 QB 429, [1953] 1 All ER 617 (C.A.)

be stressed, in a way which seemed to imply that it is necessarily relevant in determining the kind of emotional reaction that could be anticipated.

1.7 The categorization of the victims.

1.7.1 Generally

The factual distinction between primary and secondary victims of an accident is of long-standing. It was first alluded to in speeches in *Bourhill v. Young*.⁹² Lord Russell, for example, recognized it when he pointed out that Mrs. Bourhill was not physically involved in the accident. Lord Wright noted that some persons are direct victims of accidents that cause shock, whilst others are only affected in a derivative way, that is, through the circumstance of some connection with a victim in the first category.

In *Alcock*, Lord Oliver of Aymelton said that cases involving liability for nervous shock were to be broadly divided into two categories: those in which the injured plaintiff was involved, either mediately or immediately, as a participant, and those in which the plaintiff was no more than the passive and unwilling witness of injury caused to others.⁹³

In relation to those in the latter category, His Lordship said that ‘the law in general provides no remedy, however severe the consequences of the distress or grief may be to the health or well-being of the third party and however close his relationship to the victim.’⁹⁴ For that, he did not find any support in logic,

for there is, on the face of it, no readily discernible logical reason why he who carelessly inflicts an injury upon another should not be held responsible for its inevitable consequences not only to him who may conveniently be termed ‘the primary victim’ but to others who suffer as a result.

Neither was it unforeseeable because

it is readily foreseeable that very real and easily ascertainable injury is likely to result to those dependent upon the primary victim or those upon whom, as a result of negligently inflicted injury, the primary victim himself becomes dependent.

He was driven to conclude that it must be attributable to the fact that such persons are not, in contemplation of law, in a relationship of sufficient proximity, an artificial concept that depends more upon the court’s perception of what is the reasonable area for the imposition of liability than upon any logical process of analogical deduction.⁹⁵

⁹² [1943] AC 92.

⁹³ At 923.

⁹⁴ At 409.

⁹⁵ [1992] 1 AC at 411.

The distinction did not have any other purpose than to remind us that the law of torts does not generally compensate secondary victims, unless they can prove a duty owed to them personally. It assisted in the application of general notions of foreseeability and proximity, but did not otherwise have major consequences.⁹⁶

The first category included cases in which the claimant was actually exposed to the risk of physical injury, even though no physical injury occurred, as in *Dulieu v White & Son*⁹⁷; or where he reasonably believed he was at risk of physical injury, as in ‘rescuer’ cases, like *Chadwick v British Railway Board*⁹⁸ and cases where the plaintiff, as a result of the defendant’s negligence, reasonably believed that he had been the cause of injury to someone else, as in *Dooley v Cammell Laird & Co Ltd*.⁹⁹ Everyone else would be a secondary victim. However, the categorization has proved controversial and has not been particularly well received by commentators. For one thing, it is not clear cut: are ‘rescuers’ primary or secondary victims? Are bystanders who witness the accident, but who could have been hurt by it, primary or secondary victims? Can a person be both, a primary and secondary victim? Many concerns have been expressed, especially following the decision in *Frost*. The primary/secondary dichotomy proved not to be very helpful, is insufficient to allow all cases to fit in it and does not serve to achieve the desired analytical uniformity.

1.7.2 Page v Smith: Primary victims.

In *Page v Smith*,¹⁰⁰ the first case on psychiatric injury to a primary victim to reach the House of Lords, the plaintiff was involved in a collision with his car when the defendant turned negligently causing the claimant to run into him. Although both cars were damaged, the collision seemed minor. Neither the plaintiff, his wife and child who were passengers, or the defendant sustained any physical injury. There was no evidence to suggest that the plaintiff was, at any time, in fear for his own safety or the safety of the occupants of the other car. He was able to drive home, but within hours of the accident he was suffering a relapse of the symptoms of myalgic encephalomyelitis¹⁰¹, that he had suffered for 20 years and that was

⁹⁶ Mullany and Handford, above n 81, 416.

⁹⁷ [1901] 2 KB 669.

⁹⁸ [1967] 1 WLR 912.

⁹⁹ [1951] 1 Lloyd’s Rep. 271.

¹⁰⁰ [1995] 2 All ER 736.

¹⁰¹ Also known as chronic fatigue syndrome or post-viral fatigue syndrome. For the history of the controversial existence of the condition, see: E. Kim, ‘A brief history of chronic fatigue syndrome.’ (1994) 272 *Journal of the American Medical Association*, 1070.

dormant at the time of the accident. He maintained that, because of the accident, his condition became chronic and permanent with the result that he could never work again. It was not contested that the circumstances of the accident were such that some bodily injury to the plaintiff was foreseeable, even though it did not in fact occur.

Lord Lloyd expressed his agreement with the speech of Lord Oliver in *Alcock*, but attached important legal consequences to the distinction: the control mechanisms that applied in relation to a claim by a secondary victim had no application in the case of a claim by a primary victim. He indicated that as a primary victim, the plaintiff did not have to prove that his psychiatric illness was foreseeable. Foreseeability of physical injury was enough to enable the victim to recover damages. Therefore, after *Page*, there is a clear distinction between primary and secondary victims: the former encountering very few barriers, whereas the latter facing considerable obstacles.¹⁰²

Handford believes that Lord Oliver made a significant contribution by distinguishing between primary and secondary victim cases, a distinction that makes it easier to appreciate that psychiatric damage cases can arise in situations which do not involve an accident in the ordinary sense of the word.¹⁰³ However, it is clear that Lord Oliver was only concerned with the limitations which should be imposed on the foreseeability test as an issue of proximity. He did not propose a different foreseeability test for primary victims. Lord Lloyd instead, distinguished between primary and secondary victims in order to limit liability to the latter by establishing other rules limited to secondary victims.¹⁰⁴

Lord Lloyd's reference to Lord Oliver's categorisation of the victims might, at first sight, appear as a harmonious identification with the former's definition. A closer look, however, reveals a significant distinction. Lord Lloyd referred to those who were within the area of foreseeable physical injury as opposed to those who were not.¹⁰⁵ Lord Oliver instead, emphasized the participation or involvement in the event of the primary victims as opposed to those who merely witnessed it (secondary victims). These tests are not identical. One may participate without being placed in physical danger and vice versa. Lord Oliver's formulation

¹⁰² Michael Jones, 'Liability for psychiatric damage: searching for a path between pragmatism and principle' in Jason Neyers et alii (Eds) *Emerging Issues in Tort Law*. (2007) 120.

¹⁰³ Peter Handford, 'A new chapter in the foresight saga: psychiatric damage in the House of Lords.' (1996) *Tort Law Review*, 7.

¹⁰⁴ Chris Hilson, 'Nervous shock and the categorisation of victims.' (1998) 6 *Tort Law Review*, 45. Peter Handford, 'Psychiatric injury in the workplace.' (1999) 7 *Tort Law Review* 126, 135.

¹⁰⁵ Harvey Teff, 'Liability for psychiatric illness: advancing cautiously.' (1998) 61 *Modern Law Review* 855.

is a broader one and may include some plaintiffs as primary victims that are unlikely to succeed under Lord Lloyd's test.¹⁰⁶

In spite of perhaps a well-meaning attempt to facilitate recovery to primary victims by stating that the control mechanisms do not apply to them, ironically Lord Lloyd's designation of primary victims had the opposite effect of narrowing the law because of the implication that to be a primary victim one must be within the area of potential physical danger. The emphasis on physical proximity and personal danger is tantamount to reviving the outmoded and arbitrary 'zone of danger' rule.¹⁰⁷

The amorphous distinction between primary and secondary victims made in *Page* had an unfortunate effect on English law and led to significant difficulties. For instance, is a person who was in the area of physical danger but suffered shock through fear for the safety of someone else a primary or secondary victim? Are rescuers always primary victims, because they are owed a duty of care directly, or only when they have been *exposed to danger*? Alternatively, are they normally secondary victims because they are not, or not viewed as, having been personally threatened? Or are they *sui generis*? Similarly, is the distinction between primary and secondary victims relevant to employees whose psychiatric illness has been caused by their employer's negligence towards others?¹⁰⁸

In *Frost v Chief Constable of the South Yorkshire Police*,¹⁰⁹ when the court attempted to apply the distinction to rescuers and employees¹¹⁰ Lord Hoffmann seemed in such a state of despair that he felt compelled to declare that the 'search for principle was called off in *Alcock*'.

¹⁰⁶ Lord Goff in *White v. Chief Constable* disagreed with the interpretation of Lord Lloyd's judgment. According to him, Lord Lloyd was not saying that the presence of someone within the range of foreseeable injury was necessary, it was merely sufficient. In other words, there can be primary victims, e.g. employees, rescuers, who are not within the range of physical injury.

¹⁰⁷ It has been suggested that the central distinction drawn in *Alcock* (leaving aside the special treatment of rescuers) was that between those who fear for themselves and those who fear for others. The *area of physical risk* approach of Lord Lloyd obliterates that distinction, for even where the plaintiff's shock is caused by seeing what has happened to another, he is classified as a primary victim, if it just so happens that the defendant's breach might have led to his being injured instead. Donal Nolan, 'Taking stock of nervous shock' (1999) 10 *King's College Law Journal* 112, 118.

¹⁰⁸ *Ibid.*

¹⁰⁹ (1997) 1 All ER 540.

¹¹⁰ Luh Lan Luh and Susanna Leong Huey Sy. *Nervous shock, rescuers and employees*. (1998) *Singapore Journal of Legal Studies* 121, 126. In classifying police officers engaged in rescuing spectators at Hillsborough, we find Rose L.J. according them primary status because they were on duty and *directly involved*; Judge L.J. (dissenting) deeming them to be secondary victims because they were not physically endangered, and Henry L.J. saying that, as *participants*, they could be seen as primary victims, but the real issue was whether proximity could be presumed or had to be critically examined and such labelling did not seem to matter! Teff, above n 97, 855. Also in 'Liability for negligently inflicted psychiatric harm: justifications and boundaries.' (1998) 57 *Cambridge Law Journal*, 113.

However, some encouragement that the issue is not closed may be derived from the latest consideration of the matter in *W v Essex County Council*¹¹¹ where the House of Lords held that it was arguable that the parents of some children abused by a boy placed with them as a foster child by the local authority might establish that they were primary victims, on the basis that they had suffered psychiatric damage as a consequence of feeling that they were indirectly responsible for the abuse, having introduced the foster-child into the house.

Giving the judgment of the court, and contrary to the opinions of the majority expressed in *Frost*, Lord Slynn maintained that it was not always necessary for the plaintiff to be in the area of potential physical harm before he could be classified as a primary victim. In his view, there was no case that conclusively showed that the situation where parents felt involved in that way was excluded from the category of primary victims. His Lordship concluded that the categorisation of those claiming to be included as primary or secondary victims is not finally closed and remains to be developed in different factual situations.

1.7.3 The Hillsborough tragedy: secondary victims.

In April 1989 at Hillsborough Stadium, a few minutes before the start of a football match, a senior police officer decided to open an outer gate at the Leppings Lane end allowing an excessive number of spectators to enter into a section already filled to capacity. As a result, 96 of them were crushed to death and over 400 were injured. The scenes were broadcast live on television. Sixteen plaintiffs, who were either relatives or friends of victims, claimed damages for psychiatric illness. Some of them had been in the stadium at the time, some watched the horrifying scenes live on national television, and others heard of the tragedy on the radio.

The Chief Constable of South Yorkshire, the police officer responsible for the police force which had been conducting the crowd control on the day of the disaster, admitted liability for those people injured or killed, but argued that the police owed no duty of care to the plaintiffs who were claiming damages for nervous shock. The court of first instance allowed ten of the sixteen claims. The Court of Appeal dismissed all the claims. Ten cases were brought before the House of Lords, providing it with a fresh opportunity to review

¹¹¹ Jones, above n 95, 123. From another point of view, it is clear that the parent's psychiatric injury occurred well after the aftermath of the events, under the tests approved in *Alcock* and *White*, but the reluctance of the House of Lords to apply those authorities in this hard case is perfectly understandable. K. Mackenzie, 'Oh, what a tangled web we weave' in Baulac, Pitel & J Schulz (eds) *The joy of torts*. (2003) 143.

liability for nervous shock in the light of the uncertainties in this area left by *McLoughlin v. O'Brian*.¹¹² All ten plaintiffs failed in their claims.¹¹³

The main issues in the *Hillsborough* case were centred on the scope of liability when the plaintiff was neither a parent nor a spouse of the primary victim, and on whether a means of communication other than direct, unaided perception could ground a claim. On the facts of the case, it was put to test whether watching television or even listening to the radio qualified as direct perception.

It has been submitted that *Alcock*¹¹⁴, summarizing the English law on liability for psychiatric illness, rather than clarifying that vexed area, has exacerbated its incoherence.¹¹⁵

1.8 The class of persons who can claim for nervous shock.

As regards 'the class of persons whose claim should be recognised', one can distinguish between those closely related to the victim, the coincidental bystander, and the rescuer.¹¹⁶

In the early English cases of nervous shock liability, when the physical impact rule still reigned, the element regarding 'the class of persons whose claim should be recognised', played no part. With the gradual expansion of liability beyond the boundaries of direct physical impact or fear of such injury to oneself, the test for determining the existence of a duty of care was submitted to new control mechanisms imposing further limits on liability. Therefore, the courts started focusing on immediate family ties, restricting recovery to those within special relationships such as marital or filial bonds.

Lord Wilberforce's view in *McLoughlin v. O'Brian*¹¹⁷ was that recovery in cases involving the closest of family ties, such as parents, children and spouses could be justified, but cases involving less close relationships should be very carefully scrutinised. 'The closer the tie (not merely in relationship, but in care) the greater the claim for consideration', he said.¹¹⁸ On the other hand, he excluded recovery in the case of the ordinary bystander on the

¹¹² [1983] 1 AC 410. Bernadette Lynch, 'A victory for pragmatism? Nervous shock reconsidered'. (1992) 108 *Law Quarterly Review* 367, 367.

¹¹³ For references of how the succession, in a relative short period of time, of large scale disasters in England may well have heightened the judicial appreciation of the potential for massive number of psychiatric illness claims flowing from high profile instances of negligence, see Michael Davie 'Negligently inflicted Psychiatric illness: the Hillsborough case in the House of Lords.' (1992) 43 *Northern Ireland Legal Quarterly* 237, 249.

¹¹⁴ *Alcock v Chief Constable of South Yorkshire* [1992] 1 AC 310.

¹¹⁵ Harvey Teff, 'Negligently Inflicted Psychiatric Damage.' (1996) 4 *Tort Law Review* 44, 44.

¹¹⁶ Melanie Janssens, 'Nervous shock liability – A comparative study (England, France, Germany, Netherlands.)' (1998) 6 *European Review of Private Law*.

¹¹⁷ [1983] 1 AC 410,

¹¹⁸ [1983] 1 AC 410, 422.

basis that such persons must be assumed to be possessed of fortitude sufficient to enable them to endure the calamities of modern life, or that defendants cannot be expected to compensate the world at large.¹¹⁹

Before him, in *Hambrook v. Stokes*¹²⁰, Lord Atkin went even further, supporting the possibility of recovery for bystanders.

Personally I see no reason for excluding the bystander in the highway who receives injury in the same way from apprehension of or the actual sight of injury to a third party. There may well be cases where the sight of suffering will directly and immediately physically shock the most indurate heart.¹²¹

Also in *Mount Isa Mines Ltd. v. Pusey*¹²², Windeyer J noted that it is apparent that ‘persons other than relatives of persons hurt may genuinely suffer nervous shock...on witnessing another’s suffering or danger in an unexpected accident,’¹²³ and he expressed his opinion that the time had come when courts should move away from treating close relatives as an exceptional class in amelioration of the general denial that damages could be had for nervous shock.

The House of Lords in *Alcock*, however, followed Lord Wilberforce’s steps, holding that a person could recover damages for negligently inflicted psychiatric illness as a result of witnessing death, injury or peril to another only if he had ‘close ties of love and affection’ with that person.¹²⁴ A rebuttable presumption was established in favour of parents or spouses and, for Lord Keith and Lord Oliver, also engaged couples. For plaintiffs who were not entitled to the benefit of the presumption, like siblings, remoter relatives or friends, evidence that their ties with the victims were as strong as that in a parental or spousal relationship would be required. The precise methodology to be utilised to establish this requisite was not articulated, the only guidance offered being that of Lord Ackner who spoke of comparing the love and affection between these claimants and the victim to that of the normal parent, spouse or child of the victim.

¹¹⁹ At 422.

¹²⁰ [1925] 1 KB 141.

¹²¹ At 157-158. Goodhart said that it is a gloomy view of nature human which suggests that the sight of the death or injury of someone else, other than husband, wife or child, cannot create such a shock. Goodhart, above n 17.

¹²² (1970) 125 CLR 383. In that case, two employees of the defendant who were testing a switchboard were severely burnt by an intense electric arc. The short circuit caused a loud explosion. The plaintiff, who had not witnessed the accident because he was working on the floor below, ran to the scene and found one of the victims *just burn up* before his eyes. The victim’s clothes were burnt off, his skin was peeling and he was grievously hurt. The plaintiff assisted in carrying him to an ambulance. The victim whom he aided, died nine days later. Mr. Pusey subsequently developed a serious mental disorder, involving an acute schizophrenic episode and depression. The Australian High Court held that the defendant was liable for the plaintiff’s psychiatric injuries.

¹²³ At 404.

¹²⁴ [1991] 3 WLR 1057, 1100 (per Lord Keith).

Davie finds the half-way house between an approach that lists specific classes of relationship which qualify the plaintiff for recovery and an unstructured test of foreseeability requiring case by case determination attractive. He believes that the use of a rebuttable presumption in favour of spouses, parents and children conduces to certainty, whilst allowing for the possibility of claims by more remote relations caters for the needs of justice in the instant case.¹²⁵ On the contrary, Teff suggests that, instead of being sidetracked into deciding whether the plaintiff's relationship with the primary victim is comparable to some other, imprecisely delineated, relationship, it should be asked the more direct question: was the plaintiff's condition a reasonably foreseeable result of the defendant's negligence?¹²⁶

In *Alcock*, two of the appellants were at the ground, from where they witnessed the scenes. One of them (Brian Harrison) lost two brothers and the other a brother-in-law. Lord Keith considered that in neither of those cases was there any evidence of particularly close ties of love or affection with the brothers or brother in law, and in his opinion, the mere fact of the particular relationship was insufficient to place the plaintiff within the class of persons to whom a duty of care could be owed by the defendant.

In similar terms, Lord Ackner said that the relationship between them was not presented as close and intimate amounting to that very special bond of affection which would be able to produce shock-induced psychiatric illness.

Lord Oliver went even further and thought that, although both were present at the ground and saw scenes which were obviously distressing and such as to cause grave worry and concern, their perception of the actual consequences of the disaster to those to whom they were related was gradual.

Therefore, Brian Harrison learned that his case must fail because he did not prove that he had loved his brothers enough. As Nasir has pointed out, if the claim by a person who lost two brothers in circumstances as horrifying as those in the Hillsborough disaster was unsuccessful, it is difficult to envisage recovery by someone other than a parent or spouse.¹²⁷

In *Alcock* an explicit recognition was given to the fact that the essential element in relational proximity is the underlying emotional bond between the plaintiff and the accident

¹²⁵ Davie, above n 106, 239.

¹²⁶ Harvey Teff, 'Liability for psychiatric illness after Hillsborough.' (1992) 12 *Oxford Journal of Legal Studies* 440, 446.

¹²⁷ K. J. Nasir, 'Nervous shock and *Alcock*: The judicial buck stops here'. (1992) 55 *Modern Law Review* 705, 705. The question of how to identify appropriate criteria for satisfying the requirement of close ties did never have a proper answer. As Cane puts it: 'How can we justify a rule which requires mentally traumatized people to go to court and prove that they have strong feelings of love and affection towards another?' Peter Cane, *The anatomy of Tort Law* (1997) 70.

victim.¹²⁸ In fact, this has been suggested to be the only meaningful criterion of recovery for negligently inflicted psychiatric illness. Proximity to the scene of the accident and communication of the event are generally causally irrelevant and their role in judicial analyses of psychiatric illness claims has been explained as mere ‘policy levers’ which simply operate to reduce the number of psychiatric injury claims that can be made.¹²⁹

It has been submitted, however, that in practice, plaintiffs who are not parents or spouses (or the equivalent) of the primary victim are likely to have considerable difficulties in recovering damages due to the fact that successful claimants outside these categories are almost unprecedented (though just how many have tried is impossible to tell). The most graphic example is that of Brian Harrison, who lost two brothers, whom he knew to be in the affected area at the time of the disaster, witnessed the scenes from a stand immediately behind that area and, nevertheless, was denied recovery because there was insufficient evidence of the closeness of the relationship!¹³⁰

At first instance, Hidden J. had suggested that it was not logical to distinguish between spousal (ie. parent-parent), parent-child and child-parent (presumably involving sufficient relational proximity) relationships on the one hand, and relationships between siblings on the other, because all are in the relationship of the entity of the nuclear family and it is in the normal course of events that the children, having grown up together, are extremely close within the family.¹³¹ No doubt, this would be a fairer point at which to draw the line, with no realistic danger of the floodgates opening if such a relationship were to be accommodated.¹³²

Writing in 1986, that is before *Alcock*, Trindade thought that there was no reason why recovery should be confined only to members of the actual family and included, among those who deserved compensation a fiancé, or a boyfriend or a girlfriend.¹³³ In fact, one of the *Alcock* plaintiffs, Alexandra Penk, a fiancée of a young man who died in the disaster probably would probably have recovered had she been present at the scene.

¹²⁸ Per Lord Keith [1992] AC at 397. In similar words, Lord Oliver mentioned that it is the fact of an affectionate relationship which is ‘the source of the shock and distress in all these cases.’ Ibid, at 416.

¹²⁹ Teff, above n 8, 100.

¹³⁰ Nasir, above n 120, 712. Apparently there is only one case, which is unreported, where a sibling –a brother as it were- succeeded with his claim, *McCarthy v. Chief Constable of Yorkshire Police*, 11 December 1996, quoted from Law Commission Report (249) 1998, apud Gerald Schaefer, ‘The development of the law on psychiatric injury in the English Legal System.’ *New Zealand Post Graduate Law e-Journal*. Issue 4, 5.

¹³¹ *Jones v. Wright* [1991] 1 All ER 353 at p. 375.

¹³² Eng Beng Lee, ‘Case Comments. Vindication of the three proximities. *Alcock & Ors. V. Chief Constable of the South Yorkshire Police.*’ (1992) *Singapore Journal of Legal Studies*, 534.

¹³³ Markesinis, on the other hand, points out that whether a claim by a mistress or paramour of a married victim could be barred by public policy remains to be seen. Basil Markesinis and Simon Deakin, *Tort Law* (6th ed. 2008) 151.

Similarly, he believed that a teacher-pupil relationship should be regarded as sufficiently close, and gave the example of a defendant who negligently runs down a pupil who is on a school outing, within the sight or hearing of his teacher. In his opinion, he should be liable for the nervous shock which might be suffered by the teacher.¹³⁴

An alternative solution has been advanced by the Law Commission's Report on Liability for psychiatric Illness. The Commission proposed to replace the current rebuttable presumption in respect of a spouse, parent or child (and possibly fiancé), with an expanded list (the 'fixed list'), whereby close ties are *irrebuttably* presumed for spouses, parents, children, siblings and cohabitants. Adoptive relationships are included, but not those between step-parents and step-children or half-siblings. Outside the fixed list, it would be open to anyone to prove a tie of love and affection as close as for those on it. No attempt was made to define what this entails, any more than it was in *Alcock*.¹³⁵

1.9 Proximity in time and space.

1.9.1 Generally.

*Boardman v. Sanderson*¹³⁶ is generally considered the first in a series of cases in which the courts held that it was foreseeable that a plaintiff not present at the scene of the accident would arrive shortly afterwards. In this case, a father and his son had accompanied a friend to a garage to collect his car. The father went into the garage office, leaving his son outside. The friend, in backing the car out of the garage, negligently ran over the son's foot. The father heard his screams and immediately ran to his son. These events caused the father to suffer nervous shock. The court held the defendant liable because he knew (unlike in *King v. Phillips*) that the plaintiff, the father, was within earshot and was certain to come onto the scene immediately on hearing his son in distress.

In *McLoughlin v. O'Brian*¹³⁷, Lord Wilberforce had singled out closeness of time and space as important elements in establishing proximity.¹³⁸ For him, proximity was an aspect of

¹³⁴ Francis Trindade, 'The principles governing the recovery of damages for negligently caused nervous shock.' (1986) 45 *Cambridge Law Journal* 476, 488.

¹³⁵ Cf. Report, paras 6.27 (14)(e), 6.30-6.31.

¹³⁶ [1964] 1 WLR 1317.

¹³⁷ [1983] 1 AC 410.

¹³⁸ Lord Oliver observed in *Alcock* [1991] 4 All ER 907 at 930 that the first of these factors is properly to be construed as a determinant of foreseeability, only the last two relate to the proximity requirement, and this is because proximity, as Lord Atkin has elaborated it, ultimately concerns the matter of a person sufficiently *closely and directly affected by the defendant's negligence*. John Murphy, 'Negligently inflicted psychiatric harm: a re-appraisal'. (1995) 15 *Legal Studies* 415, 426.

policy. He thought that because ‘shock’ in its nature was capable of affecting so wide a range of people (i.e. reasonable foreseeability), some limitation had to be placed on the extent of admissible claims. In the case of Mrs. McLoughlin, who had not seen the accident itself, but the aftermath, it was considered that there was a sufficient temporal proximity.¹³⁹

In *Alcock*, Lord Wilberforce’s statements in *McLoughlin* that there must be close proximity to the accident, in both time and space and that the shock must come through sight or hearing of the event, or of its immediate aftermath were endorsed by Lord Oliver.¹⁴⁰ He stressed the need for the plaintiff to be present at the scene or in the ‘more or less immediate vicinity’, and for a ‘close temporal connection’ between the event and the plaintiff’s perception of it.¹⁴¹ He also emphasized that there were no precedent of cases for injuries suffered where there was not at the time of the event a degree of physical propinquity between the plaintiff and the event caused by the defendant’s breach of duty to the primary victim, nor where the shock sustained by the plaintiff was not either contemporaneous with the event or separated from it by relatively short interval of time.¹⁴²

Lord Ackner also accepted that the proximity to the accident must be close in time and space, and that injury by shock can be caused, not only through the sight or hearing of the event, but of its immediate aftermath.

Lord Jauncey, considering fruitless any discussion about the criteria that would constitute the immediate aftermath, made a simple reference to *McLoughlin v. O’Brian* ‘where it extended to a time somewhat over an hour after the accident and to the hospital in which the victims were waiting to be attended to.’ In particular, he pointed out the fact that when Mrs. McLoughlin arrived at the hospital, it appeared that they were in very much the same condition as they would have been had the mother found them at the scene of the accident.

The arbitrary nature of the test comes clear from that remark, suggesting that if the victims have received preliminary treatment they can no longer be said to be within the aftermath of an accident, but if they remain ‘begrimed with dirt and oil’ relatives or other shocked by viewing their condition are not excluded from a potential cause of action.¹⁴³ If the hospital had been able to clean them up, sedate them and put them to bed, Mrs McLoughlin would not have been able to recover.

¹³⁹ [1983] 1 AC at 422.

¹⁴⁰ At 422.

¹⁴¹ At 411.

¹⁴² At 416.

¹⁴³ Mullany and Handford, above n 81, 223.

Trindade, writing before *Alcock*, questioned what would happen if the plaintiff's mother or plaintiff's husband were overseas at the time of the accident, but on being told of the accident flew home immediately and rushed to the hospital to find the injured relative comfortably tucked in bed, albeit heavily bandaged. Is nervous shock suffered in such circumstances not compensable, he said, because blood is nowhere to be seen and the injured victim is no longer begrimed with dirt and oil? He also argued that a nervous shock suffered by a plaintiff on being told about an injury to the spinal cord of his loved one caused in a bloodless accident might be much more significant than any shock which was or would have been sustained by the plaintiff by attendance at the scene of the accident.¹⁴⁴

In *Alcock*, one issue that raised the question of the aftermath concept was the claim of those plaintiffs who identified relatives in a temporary mortuary shortly after the disaster. Despite the apparent relevance of the aftermath doctrine to the facts of *Alcock*, only two Law Lords (Lord Jauncey and Lord Ackner) dealt with mortuary identification and the aftermath concept.

Lord Jauncey incorporated the purpose of the visit to the mortuary as a factor:

‘In these appeals the visits to the mortuary were made no earlier than nine hours after the disaster and were not made for the purpose of rescuing or giving comfort to the victim but purely for the purpose of identification. This seems to me a very different situation from that in which a relative goes within a short time after an accident to rescue or comfort a victim. I consider that not only the purpose of the visits to the mortuary but also the time at which they were made take them outside the immediate aftermath of the disaster.’¹⁴⁵

This introduction of a further restriction on recovery has been unanimously criticized. Mullany and Handford find it unreasonable to suggest that the reason for coming to the scene will affect the closeness in time required for relief. The implication of this, they say, seems to be that the courts consider the viewing of a body somehow less emotionally disturbing than seeing an injured person who is still alive, albeit possibly seriously injured. They also stress the fact that Lord Jauncey overlooked the distinction between those who go to a mortuary, knowing for a fact that a loved one has died, to go through the formality of identifying the body, and those who have the distressing task of searching through rows of corpses not knowing whether the one they seek is alive but hoping and praying that they will not find that person's body.¹⁴⁶

¹⁴⁴ Trindade, above n 127, 491.

¹⁴⁵ [1991] 3 WLR 1125.

¹⁴⁶ Mullany and Handford, above n 81, 225.

It is, therefore, not immediately evident why the *purpose* of the plaintiff's visit to the primary victim of an accident should be relevant to the question of recovery for negligently inflicted psychiatric illness. Davie finds it difficult to believe, for example, that Mrs. McLoughlin would have been denied compensation if she happened coincidentally to have been at the hospital when the members of her family were admitted and saw them being conveyed to the casualty department..¹⁴⁷ In *McLoughlin v. O'Brian*¹⁴⁸, it was clear that both Lord Wilberforce and Lord Edmund-Davies were using the fact that the mother's motivation in going to the hospital was similar to that of a rescuer to support the aftermath doctrine.¹⁴⁹ But, obviously, that analogy was not aimed at suggesting that the plaintiff may recover in aftermath cases because of his intention to give aid to the primary victim. Davie argues that most relatives rushing to the hospital would appreciate that aid is at hand and that solace and comfort is all they can offer. However, their intention of providing comfort neither makes them a more likely victim of psychiatric illness nor does it make them any more deserving of compensation. He also suggests that it may make sense to encourage rescue attempts by ensuring that rescuers receive recompense for their injuries. However, there is no need to encourage relatives to offer comfort; this will happen with or without the law's intervention.¹⁵⁰

In Lord Ackner's opinion, *McLoughlin* was on 'the outer margin of acceptable extension.'¹⁵¹ Even if he considered that identification of bodies in mortuaries could be described as part of the aftermath, it seems that it has to be done fast enough, or else there will be no sufficient proximity in time and space to the accident. In any case, Mr. Alcock's identification of his brother-in-law, some eight hours after the accident could not be described as the immediate aftermath.

Before *Alcock*, two first instant decisions involving parents not present at the accident had been successful at suing for shock suffered on being told about the death of a son, but these required reconsideration.

In *Ravenscroft v. Rederiaktiebolaget Transatlantic*¹⁵² the plaintiff suffered shock when her husband told her that their son had been crushed to death while working on a ship's cargo deck. Her husband did not allow her to visit the morgue to protect her from the horrifying sight of the disfigured body. Balcombe LJ in the Court of Appeal held that, since the relevant

¹⁴⁷ Davie, above n 106, 241.

¹⁴⁸ [1983] 1 AC 410.

¹⁴⁹ Marc Owen, 'Negligence- Nervous shock. Case comment.' (1983) 42 *Cambridge Law Journal* 42.

¹⁵⁰ Davie, above n 106, 241.

¹⁵¹ At 405.

¹⁵² [1992] 2 All ER 470 CA.

shock suffered by the plaintiff did not arise through sight or hearing of the accident or of its immediate aftermath, the defendants were not liable to her.

In *Hevican v. Ruane*¹⁵³ the plaintiff was told of his son's death approximately two hours after the accident. An hour later, he saw the body of his dead son in the mortuary along with other members of his school soccer team that had died in the same bus accident. The plaintiff recovered, but the correctness of this decision was specifically doubted in *Alcock* by Lords Keith, Ackner and Oliver. Davie submits that, unless the temporal dividing line in aftermath cases lays between two and a half hours (*Ravenscroft*) and the three hours (*Hevican*), it would seem that some significance is attached to where the plaintiff sees the body, a hospital being more promising for recovery than a mortuary, and perhaps the condition of the body.¹⁵⁴

It has been submitted that to focus on hours or minutes in this type of situations is fallacious. It cannot be asserted that the trauma of viewing a dead child is any less horrific after eight or nine hours than two. Anguish of this gravity does not dissipate as rapidly as this.¹⁵⁵ Mullany and Handford give the example of a parent on holiday overseas who receives a phone call that his or her son has been killed, and returns on the next available flight to view the body a week later. Providing all the other prerequisites of liability are satisfied, they claim that recovery should be no more difficult to come by than if the parent had been able to call at the mortuary within a couple of hours of the death.¹⁵⁶

Teff has pointed out how invidious distinctions are inevitable when the immediate aftermath is treated in isolation, as a crude notion of temporal proximity. Mrs McLoughlin could succeed because she experienced shock only two hours after the crash, whereas a spectator at Hillsborough who identified a victim at the mortuary eight hours after the disaster would almost certainly have failed on that ground alone. A mother affected in precisely the same way as Mrs. McLoughlin, but too far away or too overcome to reach the hospital quickly would likewise fail.¹⁵⁷

The arbitrary nature of the test is also pointed up by the facts in *Taylor v. Somerset Health Authority*¹⁵⁸ where the plaintiff was waiting to see her husband at the hospital when she was told that he had died, and identified his body a few minutes later. Auld J held that

¹⁵³ [1992] 2 All ER .

¹⁵⁴ Davie, above n 106, 258, note 6.

¹⁵⁵ Probably nobody has referred to the inconsistency of the requirement as graphically as Stapleton when she said: "How dry does a child's blood have to be before the claim by the mother who sees her child's body in the mortuary fails" Stapleton, above n 2.

¹⁵⁶ Ibid, 144.

¹⁵⁷ Teff, above n 119, 446.

¹⁵⁸ (1993) 16 BMLR 63.

this identification was not capable of being part of the immediate aftermath of 'the event' as it went to the fact of the death as distinct from the circumstances. In *Taylorson v. Shieldness Produce*¹⁵⁹, the plaintiffs were informed that their son had been involved in an accident. They went to the hospital and waited, intermittently, by his bedside until his death three days later. The Court of Appeal denied the plaintiff's claims on the basis that to find that these events were part of the immediate aftermath would be too great an extension of the principles set out in *Alcock*.

The absurdly high degree of physical and temporal proximity that is needed is hidden in Lord Oliver's judgment accepting that even being at the same place of the accident (including events of huge dimensions, as it was the case in Hillsborough) could be not enough. It appears that a mere general perception of events, witnessing a disaster knowing that a particular person may be involved, but without being sure of his or her fate will lead to the failure of a claim.

Unfortunately, in spite of the wide criticism that the *Alcock* decision has suffered, no significant movements from the court's attitude to nervous shock have been observed. The UK Law Commission's recommendation that the law should abandon the requirements of closeness in time and space and shock did not have any practical application.

1.9.2 The immediate aftermath of an accident.

The first occasion on which the House of Lords held a defendant liable for negligently causing nervous shock to the plaintiff came with *McLoughlin v O'Brian*¹⁶⁰. It was one of the so-called 'aftermath' cases, raising the question whether someone not present at the scene of grievous injuries to her family but who comes upon those injuries after an interval of time can recover damages for nervous shock. Prior to that decision, it was generally accepted that damages for nervous shock could only be awarded to persons who feared for their own personal safety, or who feared for the safety of very close relatives such as their children only if they in some way witnessed the tortious event at the time of its occurrence.¹⁶¹

The plaintiff's husband and three of their children were involved in a car accident caused by the negligence of the drivers of two other vehicles. Mrs. McLoughlin, at her home, an hour or so later, was informed of the accident by a neighbour. She rushed to the local

¹⁵⁹ [1994] PIQR P329.

¹⁶⁰ [1983] 1 AC 410.

¹⁶¹ Choo Han Teck, 'Extended shock. *Jones & Others v. Wright*.' (1991) *Singapore Journal of Legal Studies* 491, 491.

hospital where she found her husband and two of the children, covered with mud and oil, suffering from various injuries. She was also told that her other daughter had died in the accident. As a result of the experience at the hospital she suffered severe shock for which she sought to recover damages. The respondents argued that in the light of the previous authorities, they owed no duty of care to a person who was not at the scene of the accident nor within a zone of physical danger.

At first instance, Mrs. McLoughlin was denied recovery on the ground that, whereas grief or sorrow¹⁶² could reasonably be foreseen in such circumstances, principle and common sense dictated that injury by shock was too remote. The Court of Appeal rejected that narrow view of foreseeability but, nevertheless, applying the *Anns v. Merton London Borough Council's* two tier approach of negligence, dismissed the appeal.¹⁶³ In the Court's view, considerations of public policy suggested restricting any duty of care to persons in close proximity of time and place to the scene of the accident.¹⁶⁴

The House of Lords, in five divergent opinions, considered that the policy considerations were not sufficient to negative the *prima facie* duty of care. The floodgates argument and the fear of fraudulent claims were rejected.

In his comments on the case, Street states that in Mrs. McLoughlin's action against the four defendants, the five Law Lords were agreed on one thing, and nothing more: that her claim succeeded. The *ratio decidendi* is then that if a mother does not witness or hear an accident involving her husband and children, but it is foreseeable that in the immediate aftermath of the accident she will see the victims, she has a claim in negligence for nervous shock resulting from these events. In other words, it was authoritatively settled, for the first time, that an action lay for nervous shock by someone who neither saw nor heard the accident.¹⁶⁵

Lord Wilberforce relied heavily on *Dillon v. Legg*¹⁶⁶ where the Supreme Court of California adopted a foreseeability test, to be determined on a case-by-case basis, using three

¹⁶² For a description of the policy reasons that the courts have been applying to exclude recovery for grief and sorrow, see Des Butler, 'Identifying the compensable damage in 'nervous shock' cases'. (1997) 5 *Torts Law Journal* 1, 7.

¹⁶³ Teff, above n 8, 108.

¹⁶⁴ Commentators point out that since *McLoughlin* there has been a changing climate in the law of torts, exemplified by the retreat from *Anns* with the two-stage test being rejected in favour of a restrictive incremental approach to liability. Yet, in the context of nervous shock, the courts have been compelled to recognise that increased medical knowledge has led to a grater understanding of the nature and causes of trauma, which itself may open the door to more succesful claims. Louise Dunford and Vivien Pickford, 'Nervous shock: another opportunity missed to clarify the law? (1997) 48 *Northern Ireland Legal Quarterly* 364, 376.

¹⁶⁵ Harry Street, 'Comment. Liability for nervous shock'. 34 *Northern Ireland Legal Quarterly* 53, 53.

¹⁶⁶ (1968) 441 P.2d 912.

factors as guidelines: proximity to the scene, direct emotional impact stemming from sensory and contemporaneous observance of the accident, and closeness of relationship.¹⁶⁷

His Lordship, expressing concern about the possibility of widening too much the range of people that could be protected, stated that there is

a real need for the law to place some limitation upon the extent of admissible claims. It is necessary to consider three elements in any claim: the class of persons whose claims should be recognized; the proximity of such persons to the accident; and the means by which the shock is caused...The closer the tie (not merely in relationship, but in care) the greater the claim for consideration. The claim, in any case, has to be judged in the light of the other factors, such as proximity to the scene in time and place, and the nature of the accident.¹⁶⁸

Those elements were considered necessary limitations on the application of reasonable foreseeability, conditioning the duty of care. However, it is immediately evident that at least one of those factors was absent, as the plaintiff first saw the victims at the hospital only a couple of hours after the accident. Even so, Lord Wilberforce was emphatic in pointing out that

experience has shown that to insist on direct and immediate sight or hearing would be impractical and unjust and that under what may be called the ‘aftermath’ doctrine, one who, from close proximity comes very soon on the scene, should not be excluded.

To justify that extension, he argued that the circumstance was analogous to that of a rescuer. The comparison with rescuers has been criticized since it is widely accepted that a remedy for rescuers owes much to the policy of encouraging their activities. Obviously, no such incentive is required to prompt close members of a family to visit one another in hospital. It is probably because physical proximity to the scene of the accident has played such a central role as a criterion of liability that judges may feel constrained to resort to artificial analogies such as rescue when proximity is absent.

Lords Russell and Edmund-Davies found that foreseeability was not a universal test and that in an appropriate case policy considerations might be relevant, but that on the facts of *McLoughlin* there were no policy reasons which justified refusal of the claim.

¹⁶⁷ Teff, above n 8, 103. Mullany and Handford also believe that these three factors appear to have been drawn from the judgment of Tobriner J in the leading United States case of *Dillon v. Legg*. Mullany and Handford, above n 81, 125, note 160. In the States, the three *Dillon* factors have been given different weights in the jurisdictions which have adopted it. Some of them have placed greatest emphasis on the relationship factor, asserting that since the purpose of the factors is to assess the degree of foreseeability of injury to the plaintiff, it should be apparent that it is most foreseeable that close relatives will be upset by serious injury to a loved one. Marlowe, above n 42, 808.

¹⁶⁸ At 990. Mullany and Handford submit that the fact that Lord Wilberforce clearly regarded foreseeability alone as an insufficient criterion of liability, and policy considerations as highly relevant may suggest that he never intended the first of his two stages in *Anns* to be limited to the issue of foreseeability. Handford, above n 81, 125.

On a distinct approach, Lord Bridge of Harwich thought that the defendant's duty depended on bare reasonable foreseeability of injury by shock, as any attempt to limit liability by reference to criteria such as those mentioned by Lord Wilberforce would impose arbitrary limits. He considered that it would be an approach which threatened to freeze the law in a rigid posture which would deny justice to some who, in the application of the classic principles of negligence derived from *Donoghue v Stevenson*, ought to succeed.¹⁶⁹ These factors should only be considered for any relevance they might have on the degree of foreseeability of the plaintiff's psychiatric illness.

Lord Scarman also thought that

space, time, distance, the nature of the injuries suffered, and the relationship of the plaintiff to the immediate victim of the accident, are factors to be weighed, but not legal limitations, when the test of reasonable foreseeability is to be applied.¹⁷⁰

Adopting the reasonable foresight test, he held that foreseeable nervous shock should be recoverable unless Parliament decided otherwise. In his view, the House of Lords could not deal with questions of policy but was confined to issues of principle. Therefore, any limits should be set by legislation.

Because of the similarities of the factual situations, much of the reasoning in *McLoughlin v. O'Brian*¹⁷¹ was relied upon by the High Court of Australia when deciding *Jaensch v. Coffey*¹⁷². The plaintiff, who was at home when her husband was seriously injured in a collision, did not go to the scene of the accident but was taken shortly afterwards to the hospital where she saw him with a dislocated hip and in great pain. As in *McLoughlin*, the High Court took pains to stress that the plaintiff, though not present at the scene of the accident was present at, and personally perceived, the *aftermath* of the accident.

In an effort to define the 'aftermath' Mr. Justice Deane said that:

The facts constituting a road accident and its aftermath are not...necessarily confined to the immediate point of impact. They may extend to wherever sound may carry and to wherever flying debris may land. The aftermath of the accident encompasses events at the scene after its occurrence, including the extraction and the treatment of the injured. In a modern society, aftermath also extends to the ambulance taking an injured person to hospital for treatment and to the hospital itself during the period of immediate post-accident treatment.¹⁷³

¹⁶⁹ At 443. Street believes that Lord Bridge's notion of reasonable foreseeability is indistinguishable from policy. Above n 158, 54.

¹⁷⁰ At 998.

¹⁷¹ [1981] 1 QB 599.

¹⁷² (1984) 155 CLR 549.

¹⁷³ At 607. Brennan J. noted that 'in view of today's fast and efficient ambulance services, liability cannot rationally be made to depend upon a race between the spouse and an ambulance.' At 578.

Reasonable foreseeability was for Brennan J. the sole test of liability in nervous shock cases, but Gibbs C.J. and Deane and Murphy J.J. took the approach that there were other limitations outside the test of foreseeability which, on policy grounds, might prevent the duty of care from arising. For Deane J. the additional factor was a relationship of proximity, a test which he outlined in this case for the first time.

After *Tame v New South Wales*¹⁷⁴, considered below, this, as well as other requirements have been relaxed, or hold that they are simply factors to be taken into account in an overall assessment based on reasonable foreseeability.

1.9.3 Shocking events on television.

Another controversial issue in *Alcock* was whether a means of communication other than direct unaided perception could ground a claim. If presence was necessary, as the House of Lords recognized, the next question that arose, therefore, was if watching television, or even listening to the radio also qualified as ‘direct perception’.

At first instance, nervous shock was considered reasonably foreseeable in principle for claimants who had seen live TV broadcasts, but not for those who had been told of the disaster or had heard a live radio broadcast and only later on saw recorded TV news items. The justification was that radio coverage is unlikely to provide identification of a victim together with details of personal suffering sufficiently specific to satisfy the proximity test. Hidden J. said that ‘it is the visual image which is all-important. It is what is fed to the eyes which makes the instant effect upon the emotions, and the lasting effect upon the memory.’¹⁷⁵ However, the learned judge applied a significant limitation, holding that a line has to be drawn between watching the event through television *live* and watching it through a delayed telecast. He also held that, while nervous shock caused by *watching live* coverage was recoverable, nervous shock caused by *listening* to a *live* broadcast over the radio was not.

The Court of Appeal said that nervous shock caused via live TV could be recoverable only in very exceptional circumstances. Because of the existence of the broadcasting code of ethics, the defendant could reasonably expect that the television cameras would not show shocking pictures of suffering by recognisable individuals.¹⁷⁶ A violation of the code would, in the Court’s opinion, represent a *novus actus interveniens* which would break the chain of

¹⁷⁴ (2002) 211 CLR 317.

¹⁷⁵ [1991] 1 All ER 843.

¹⁷⁶ [1991] 3 WLR, per Nolan LJ. at 1094.

causation between the defendant's conduct and the psychiatric illness. In many instances this would mean ample room for debate on the difficult causal question whether losses would be properly attributable to the initial act of negligence, or should fall on the shoulders of the broadcaster.

The House of Lords, following the Court of Appeal, held that those plaintiffs who had watched the scenes at Hillsborough on television were not within the requisite degree of proximity to the tragedy and could not recover for the psychiatric illness they had sustained. The basic rule stated by Lord Wilberforce that the shock must be caused by sight or hearing of the accident or its immediate aftermath was unanimously approved of by the House. In *McLoughlin*, the learned judge had left open the question of whether this could be satisfied by viewing of simultaneous television broadcasts, but in *Alcock* the Law Lords established that this could be only in very exceptional circumstances. Though the television scenes certainly gave rise to feelings of the deepest anxiety and distress, this was equivalent to being told about the events by a third party.

Lord Keith held that the viewing of television broadcast could not be 'equiparated with the viewer being within sight or hearing of the event or its immediate aftermath...nor can the scenes reasonably be regarded as giving rise to shock, in the sense of sudden assault on the nervous system.'¹⁷⁷ He took into consideration that the television broadcasting code of ethics did not allow to depict scenes of death or suffering by recognisable individuals, and that no such pictures were shown on the occasion of the Hillsborough disaster. Therefore, it was not reasonably foreseeable that a television viewer would see scenes that would cause psychiatric illness.

Butler argues that such reasoning was defective in, at least, three respects. a) To place such reliance upon the Code of Ethics amounts to an abdication of the determination of the limits of liability to an outside body. He questions where the law would be left if the broadcasting authorities changed their views as to what could and could not be broadcast. b) He believes that, in modern days of keen competition between media operators, it is not unreasonable to expect broadcasters to breach the Code of Ethics from time to time. As a consequence, Butler submits that any notion that, merely because there is a Code of Ethics that purports to prohibit broadcasters from engaging in particular conduct, broadcasters will not engage in that conduct is, to say the least, naïve. c) Even a well intentioned broadcaster

¹⁷⁷ [1992] 1 AC 310, 398.

attempting to comply with a Code of Ethics may still inadvertently (or unexpectedly) broadcast such an image.¹⁷⁸

Lord Ackner said that, although the television pictures certainly gave rise to feelings of the deepest anxiety and distress, in the circumstances of the case the simultaneous television broadcasts of what occurred could not be equated with the ‘sight or hearing of the event or its immediate aftermath’. Accordingly, shocks sustained by reason of those broadcasts could not found a claim.¹⁷⁹ He agreed, however, with Nolan LJ that simultaneous broadcasts of a disaster could not in all cases be ruled out as providing the equivalent of the actual sight or hearing of the event or its immediate aftermath. He expressed the view that in particular horrific circumstances, the ‘recognisable individual’ requirement might be discarded and gave the example, previously postulated by Nolan L.J. in the Court of Appeal, of a situation

where it was reasonable to anticipate that the television cameras, whilst filming and transmitting pictures of a special event of children travelling in a balloon, in which there was media interest, particularly amongst the parents, showed the balloon suddenly bursting into flames. Many other situations could be imagined where the impact of the simultaneous television picture would be as great, if not greater, than the actual sight of the accident.¹⁸⁰

It has been suggested that the distinction would be that in the balloon case the parents would know that their children had been killed or injured, whereas parents watching crowd scenes would not know but only fear for their children’s safety. Trindade had given a similar example: suppose, he wrote, a plaintiff in Oxford is watching a live broadcast of a motor race being conducted in another part of England in which her husband is a participant, and owing to the negligence of the defendant, the car which her husband is driving explodes and he is incinerated. Is there any good reason why the plaintiff should not recover for the nervous shock that she suffers as a result of watching that live television broadcast? Is there any good reason why *watching* should not be regarded as equivalent to sight or hearing?¹⁸¹

The comparison proposed by Lord Ackner of the balloon scenario and the Hillsborough disaster shows a hypothetical case of nervous shock where it could be equiparated with the viewer being within sight or hearing of the event or its immediate aftermath. The conditions would be: *live* transmission of an event which the defendant could reasonably have foreseen would be televised and watched by family members of the primary victims, and a sudden unexpected disaster. In such a case, the lack of capacity of the broadcaster to decide whether

¹⁷⁸ Des Butler, ‘Nervous shock at common law and third party communications: are Australian nervous shock statutes at risk of being outflanked?’ (1996) 4 *Torts Law Journal* 1, 8.

¹⁷⁹ At 405.

¹⁸⁰ [1991] 3 WLR 1057, 1108.

¹⁸¹ Trindade, above n 127, 492.

or not to broadcast distressing pictures makes it impossible to consider the transmission as a break of the chain of causation between the initial harmful act and the psychiatric illness.

Davie suggests that given the *obiter* nature of the remarks on this exception and the fact that there was no majority in favour of it, it would seem that future courts will have a free rein to utilise this exception or not as they think fit. He also believes that, provided that the claims of simultaneous television viewers are confined to loved ones of the primary victims and are not extended to strangers, this would not seem to pose a threat of an undue flood of claims.¹⁸² Woollard is of the same view, stating that although the intervention of mass media immediately raises the spectre of numerous potential claims, the majority of cases would probably involve single plaintiffs who would still have to prove a tie of love and affection in order to succeed and therefore a flood of claims is unlikely to materialize.¹⁸³

In relation to television as a means of causing sudden shock, Lord Oliver suggested that

the shock in each case arose not from the original impact of the transmitted image, which did not, as has been pointed out, depict the suffering of recognisable individuals...The trauma is created in part by such confirmation and in part by the linking in the mind of the plaintiff of that confirmation to the previously absorbed image.¹⁸⁴

It has been submitted that the point here concerns the fact that the transmitted images were not in fact causally sufficient to produce sudden psychiatric illness. The message from Lord Oliver's speech seems to be that if scenes of death or suffering of recognisable individuals had been transmitted, this could have given rise to shock; but pictures indicating peril can only stimulate anxiety and this is not sufficient for a claim of negligently inflicted psychiatric illness.¹⁸⁵ It has been pointed out that in *Alcock*, the House of Lords sees one factor, the mode of perception, artificially divorced from another, closeness of ties, as if they were entirely self-contained.¹⁸⁶

Lord Jauncey also concluded that the viewing of the television scenes of Hillsborough could not be equated with the viewer being within the sight or hearing of the event or its immediate aftermath. The explanation he found was that,

a television programme such as that transmitted from Hillsborough involves cameras at different viewpoints showing scenes all of which no one individual would see, edited pictures and a commentary

¹⁸² Davie, above n 106, 257.

¹⁸³ Suzanne Woollard, 'Liability for negligently inflicted psychiatric illness: where should we draw the line?' (1998) 27 *Anglo-American Law Review* 125.

¹⁸⁴ [1991] 3 WLR 1057, 1114.

¹⁸⁵ Davie, above n 106, 244.

¹⁸⁶ Teff, above n 119, 447.

superimposed. I do not consider that such a programme is equivalent to actual sight or hearing at the accident or its aftermath.¹⁸⁷

Butler, however, argues that the camera angles do not necessarily lessen the impact upon a viewer. A zoom view, different angle or commentary may render the events more horrific for a television viewer than a percipient witness in another part of the ground relying on the naked eye.¹⁸⁸ Davie also considers that the television viewer is a superior observer of the scene in terms of the enhanced appreciation made possible by the features of televisions such as multiple perspectives, close-ups, replays, slow motion, commentary etc. He concludes that the relevant question is whether television viewing is equivalent to being there in terms of one's ability to appreciate what is occurring, and in relation to this, he does not doubt that the answer must be positive.¹⁸⁹

1.9.4 Immediate sight or hearing.

Another aspect confirmed by *Alcock* was the traditional view that claims for shock caused by being informed by a third party of the death of a loved one are excluded by the notion of proximity. The requirement of hearing and seeing the accident had been enunciated by Denning L.J. in *King v. Phillips*¹⁹⁰ saying that,

a mother who suffers shock on being told of an accident to a loved one cannot recover damages from the negligent party on that account...But...a mother who suffers from shock by hearing or seeing, with her own unaided senses, that her child is in peril...may be able to recover from the negligent party even though she was in no personal danger herself.¹⁹¹

Lord Wilberforce in *McLoughlin* said that the 'shock must come through sight or hearing of the event or its immediate aftermath'.¹⁹² He posed as justification for this limit the fact that 'there is no case in which the law has compensated shock brought about by communication by a third party.'¹⁹³ Butler submits that this assertion was misconceived because, although his Lordship relied on Australian and Canadian authorities in addition to

¹⁸⁷ [1991] 3 WLR 1057, 1125.

¹⁸⁸ Butler, above n 171, 12.

¹⁸⁹ Davie, above n 106, 246.

¹⁹⁰ [1953] 1 QB 429, [1953] 1 All ER 617 (C.A.)

¹⁹¹ [1953] 1 QB 429, 441.

¹⁹² [1983] 1 AC 410, 423. The only reported case prior to *McLoughlin* where a plaintiff succeeded when he was not actually at the scene of the accident was *Boardman v Sanderson*. This decision was justified on the ground that the plaintiff father who heard his son's scream suffered the injury of nervous shock through learning of the event by his own unaided senses at the time of the accident. Cf. Choo Han Teck. 'Extended shock. Jones & Others v. Wright.' (1991) *Singapore Journal of Legal Studies*, 491.

¹⁹³ [1983] AC 410 at 421-2.

English cases in supporting the other limits, he failed to take into account a sizeable line of Australian authority that approved of liability where there was third party communication.¹⁹⁴

The requirement of immediate sight or hearing of the accident or the aftermath would most likely rule out even claimants with close tie and affection unless they came upon the immediate aftermath. Besides, it suggests bygone social conditions where relatives could be expected to be close at hand and arrive at the accident scene within minutes.¹⁹⁵

In light of these circumstances, Lord Bridge of Harwich said that the hard and fast line of policy that required direct perception might lead to injustice. To support his view, he gave the example of a mother who sees the newspaper photograph of unidentified, trapped victims of a fire at a hotel where she knew her family had been staying, and is later told of their death. The learned judge argued that it would indeed be unconscionable to deny her claim merely because an important link in the chain of causation of her psychiatric illness was supplied by her imagination of the agonies of mind and body in which her family died rather than direct perception of the event.¹⁹⁶ This example suggested that the unforeseeability of suffering to loved ones being depicted by television was not sufficient to exclude the possibility of recovery.

The House of Lords in *Alcock* unanimously accepted the orthodox requirement that nervous shock must be induced by direct personal perception, rejecting the possibility of recovery where the plaintiff's psychiatric injury resulted from being told of an accident or distressing event by another.¹⁹⁷ Mullany regards the refusal to compensate Mr. and Mrs. Copoc for their psychiatric injury consequent on learning of the death of their son at Hillsborough simply because they were not at the stadium themselves, as a low point in English tort law.¹⁹⁸ He also points out that the psychiatric literature does not allow the assertion that the impact of trauma is inevitably more severe if directly perceived. The effect of oral (or written) communication, he says, can be equally devastating for the most steadfast of minds. The traditional insistence on unaided senses, he concludes, is an affront to all reasonable, compassionate and right thinking members of contemporary society and an embarrassment to the common law.¹⁹⁹

¹⁹⁴ Des Butler, 'A 'kind of damage': removing the 'shock' from *nervous shock*' (1997) 5 *Torts Law Journal* 12 19.

¹⁹⁵ Peter Handford, 'Psychiatric injury: the new era.' (2003) 11 *Tort Law Review* 18.

¹⁹⁶ [1983] 1 AC 410, 442.

¹⁹⁷ [1992] 1 AC 310 at pp. 398, 400, 416, 418, 423.

¹⁹⁸ Nicholas Mullany, 'Personal perception of trauma and sudden shock: South Africa simplifies matters.' (2000) 116 *Law Quarterly Review* 29-36.

¹⁹⁹ Nicholas Mullany, 'Recovery for psychiatric injury by report: another small step forward.' (1996) 4 *Tort Law Review*, 101.

1.9.5 Proximity in other common law jurisdictions

(a) Canada.

In Canada, the requirement that the plaintiff must have been present at the scene of the accident or its immediate aftermath has been the most important limiting factor in leading cases such as *Abramzik v Brenner*²⁰⁰, *Rhodes v Canadian National Railway*²⁰¹ and *Devji v District of Burnaby*²⁰².

In *Abramzik*, which predates *McLoughlin*, the Saskatchewan Court of Appeal heard the claim of a mother who suffered a nervous breakdown after hearing the news that her two children had been killed in a level crossing accident. The woman was informed of the accident by her husband, who had arrived on the scene shortly after the accident. Recovery was denied.

In *Rhodes* the plaintiff's son was killed in a train disaster in Hinton, Alberta. She heard about the accident on the radio while at her home in Vancouver Island, and immediately travelled to Hinton to see if her son was among the victims. She saw pictures of the wreckage in the newspapers and over a period of several days came to the realisation that he must have died. She did not see her son or his body because his remains had been consumed by fire in the accident. For reasons unconnected with the defendant, she had to endure a very distressful period of eight days before reaching the scene of the crash and when she eventually got there the wreckage had been removed. After that, she was sent to the wrong memorial service so she missed the official ceremony in remembrance of the dead and her son's remains were sent to her unannounced, by ordinary mail, in an unmarked cardboard box. All this caused the plaintiff to suffer a major depression and other signs of mental disturbance. In the event, the appellate court rejected her claim for reactive depression.

It has been suggested that the case bears a strong resemblance to Lord Bridge's example of the hotel fire. Though the extrinsic factors which prolonged Mrs. Rhodes' ordeal plainly complicated the issue of causation, too much stress may have been laid on the absence of a specific shock and on third party communication.

The Court was united in the result, but divided on the statement of the rule. Mackenzie suggests, however, that the British Columbia Court of Appeal, while expressing it in different

²⁰⁰ (1967) 65 D.L.R. (2d) 651.

²⁰¹ (1990) 75 CLR (4th) 248

²⁰² (1999) 180 DLR (4th) 205. (BCCA)

ways, the common ground appears to be a requirement that the plaintiff has to witness the scene of the accident or its immediate aftermath.²⁰³

In *Devji v. District of Burnaby*, the parents and sisters of a young man who died in a motorcycle accident suffered psychiatric injury on learning of the death and attending hospital four hours latter to view the victim's body in the morgue.

The British Columbia Court of Appeal refused to extend the aftermath principle beyond the previously accepted limits, or to recognise claims based on the receipt of shocking news where direct perception was lacking. The court placed much stress on the maintenance of the existing limits as determined by earlier precedents.

Mackenzie finds the arbitrary results of such distinctions well illustrated in *Yu v. Yu*²⁰⁴, where the plaintiff was injured in a motor vehicle accident in which her eight-year-old daughter was killed. The plaintiff was rendered unconscious in the accident and did not learn of her daughter's death until after coming to in the hospital.²⁰⁵

Rejecting the argument that her illness was not caused by perception at the scene, Clancey J. allowed her claim for psychiatric illness in reaction to the child's death, stating his inability to see how public policy could serve to limit recovery by a mother who has been rendered unconscious by the negligence of a defendant while a mother who retains her faculties succeeds. That would lead to the unusual finding that by inflicting greater injury on a plaintiff, a defendant could limit his liability.²⁰⁶

(b) Australia.

Australian courts have proved to be at the forefront of development in relation to psychiatric damage. The first case to consider *McLoughlin* was *Jaensch v Coffey*.²⁰⁷ The facts were very similar. The plaintiff's husband had been severely injured in a motor accident caused by the defendant's negligence. The plaintiff was at home at the time of the accident. She was taken to a hospital and there saw her husband in severe pain wheeled in and out of an operating theatre on three occasions. She was told that her husband was 'pretty bad.' She went home to have some rest and had a telephone call next morning at 5.30 a.m. from a

²⁰³ K. Mackenzie, 'Oh, what a tangled web we weave' in Baulac, Pitel & J Schulz (eds) *The joy of torts*. (2003) 133. See also, Des Butler, 'Proximity as a determinant of duty: The nervous shock litmus test.' (1995) 21 *Monash University Review*, 177.

²⁰⁴ (1999) 48 M.V.R. 3d 285 (B.C.S.C.)

²⁰⁵ Mackenzie, above n 196, 141.

²⁰⁶ At. 304.

²⁰⁷ (1984) 155 CLR 549.

doctor who informed her that her husband was in intensive care. At 8.30 a.m. she had another call from the intensive care unit saying that her husband ‘had a change for the worse and that she should get to the hospital as soon as possible.’ She stayed at the hospital not knowing whether her husband would survive. The plaintiff’s early unhappy life had predisposed her to anxiety which coupled with her experience at the hospital caused her to believe that her husband would die and the security of her happy marriage would be ‘washed down the drain.’ After her experience at the hospital, although her husband survived, Mrs. Coffey suffered severe anxiety and depression. Her psychiatric condition caused gynaecological problems and a hysterectomy had to be performed later.

Chief Justice Gibbs reserved his opinion as to the correctness of some of Lord Wilberforce’s comments, ‘in particular on his statements that there must be a close proximity in space as well as in time and that “the shock must come through sight or hearing of the event or of its immediate aftermath.” The law must continue to proceed in this area step by cautious step.’²⁰⁸

Justice Deane noted that it was possible to point to a number of judicial statements to the effect that a person ‘who suffers shock on being told of an accident to a loved one cannot recover damages from the negligent party on that account.’ He added, however, that the requirement that the plaintiff must have perceived the peril or injury by his or her ‘own unaided senses’ had not enjoyed unqualified support either in the United Kingdom or Australia²⁰⁹ and that the question whether the requirement of proximity precluded recovery in a case where reasonably foreseeable psychiatric injury was sustained as a consequence of being told about the death or accident, remained an open one. His Honour said that it was

somewhat difficult to discern an acceptable reason why a rule based on public policy should preclude recovery for psychiatric injury sustained by a wife and mother who is so devastated by being told on the telephone that her husband and children have all just been killed that she is unable to attend at the scene while permitting recovery for the reasonably, but perhaps less readily, foreseeable psychiatric injury

²⁰⁸ At 555. Whilst his Honour required more than foreseeability, he was unwilling to be bound by unnecessary and inflexible rules that would hamper development. Ramanan Rajendran, ‘Told nervous shock: has the pendulum swung in favour of recovery by television viewers?’ (2004) 31 *Deakin Law Review* 6. It has been pointed out that, in his short judgement, Gibbs CJ. found that by visiting the hospital she had *personally perceived* the aftermath. Precisely what might constitute an *aftermath* he did not consider. Wheat, above n 7, 331.

²⁰⁹ He was referring to *Schneider v. Eisovitch* [1960] 2 QB 430 and *Andrews v. Williams* (1967) VR 831. In *Schneider*, damages were awarded to the plaintiff who suffered shock on being told of her husband’s death in a car crash in which they had been both involved but during which she lost consciousness. The court considered that the fact that a period of time elapsed before the news was heard made no difference, because the news was a consequence which flowed directly from the breach of duty. The case is distinctive because the plaintiff was both a primary and a secondary victim so that the negligent defendant’s duty of care, once established could not be debarred by spatial limitations. In *Andrews*, the plaintiff, who had been driving and was rendered unconscious through a collision, was told a few days later of the death of her mother who had been a passenger. It should be noted that the plaintiffs in these cases suffered personal injury in the same accident as the victim.

sustained by a wife who attends at the scene of the accident or at its aftermath at the hospital when her husband has suffered serious but not fatal injuries.²¹⁰

However, his Honour thought it was unnecessary to pursue the question since the authorities plainly indicated that the overriding limitation upon the test of reasonable foreseeability did not preclude recovery in a case, such as the one under consideration, where the psychiatric injury was sustained as a result of the combined effect of what a plaintiff himself or herself observed and what he or she was told while at the scene of the accident or its aftermath.²¹¹

As regards perception through unaided senses, the majority of the Australian High Court left open the position of a plaintiff who did not witness the tortious event or aftermath but suffered shock on being informed. But the decision in *Jaensch v Coffey*²¹² entitling the plaintiff to recover damages for nervous shock even though she was not at the scene of the accident, and did not go to the scene, suggested that, at least for those who have a close tie of relationship with the person who suffered the accident or was put in peril by the negligence of the defendant, it should not be necessary that the shock come only through sight or hearing of the event or its immediate aftermath, nor that there be *nearness* in the sense of time and space.²¹³

Furthermore, Kirby P., in his dissent in *Coates v Government Insurance Office of New South Wales*²¹⁴, rejected the submission of the defendant that an individual who was not present at the scene or aftermath of an accident, and was informed about the accident by telephone or a later message should not be entitled to recover, considering that

the rule of actual perception is in part a product of nineteenth century notions of psychology and psychiatry. In part it was intended as a shield of policy against expanding the liability of wrongdoers for the harm they caused. And in part, it was a reflection of the nineteenth century modes of communicating information.²¹⁵

²¹⁰ At 608.

²¹¹ In *Petrie v. Dowling* (1992) 1 Qd R 284, Kneipp J of the Queensland Supreme Court noted that in *Jaensch v. Coffey* Deane J had indicated that a plaintiff who suffered shock from the combined effect of hearing distressing news and seeing her loved one in an injured condition could recover, and concluded that 'in an appropriate case it is sufficient that it be proved that shock and consequent illness follows on the receipt of distressing news... In the present case the plaintiff attended at the hospital, no doubt distressed at the fact that her daughter had been in an accident but in the belief that she had not sustained serious injury, only to be told bluntly that her daughter had died.' At 286-7.

²¹² (1984) 155 CLR 549.

²¹³ Trindade, above n 127, 494. Ann O'Connell and Robert Evans '*Jaensch v. Coffey*.' (1985-1986) 164 *Melbourne University Law Review* 164.

²¹⁴ (1995) 36 NSWLR 1.

²¹⁵ (1995) 36 NSWLR 1 at 10.

He also expressed his conviction that the rule was hopelessly out of contact with the modern world of telecommunications.

If any judge has doubts about this, he or she should wander around the city streets and see the large number of persons linked by mobile telephones to the world about them. Inevitably such telephones may bring, on occasion, shocking news, as immediate to the senses of the recipient as actual sight and sound of a catastrophe would be. This is the reality of the world in which the law of nervous shock must operate.²¹⁶

Gleeson C.J. and Clarke J.A. left open the issue of the status of the told rule in Australia.

A similar line of reasoning can be seen in *Reeve v. Brisbane City Council*.²¹⁷ The plaintiff's husband, a cleaner at a bus depot, was run down and killed by a bus driven by the second defendant, an employee of the first defendant. The plaintiff did not go to the depot and only saw the body for the first time several days later at a funeral parlour. Despite her absence from the scene and failure to witness the accident or its aftermath, Lee J. found that the requisite relationship of proximity was present. His Honour stated that proximity could be satisfied by the close relationship between the plaintiff and the victim 'notwithstanding the absence of any physical connection with or independent perception of the accident or its aftermath.'²¹⁸

Butler explains that Lee J. saw proximity as a compendious concept, whereas Deane J in *Jaensch v. Coffey*²¹⁹ had identified proximity as being able to be broken into the components of physical, circumstantial and causal proximity. They do not dictate a conclusion in a particular case, but rather provide a guide to the factual inquiry the court is required to make. Generally, it depends on the circumstances what weight each component carries: accordingly, the strength of one aspect of the concept may supply deficiencies created by the absence or weakness of another. Thus, since the plaintiff and her husband had been close, that factor combined with causal proximity were so strong as to supply the necessary proximity, without the need for any physical proximity between the plaintiff and the accident scene, and presumably any actual perception of the accident.²²⁰

²¹⁶ Ibid. at 11.

²¹⁷ (1995) 2 Qd R 661.

²¹⁸ At 674.

²¹⁹ (1984) 155 CLR 549.

²²⁰ Butler, above n 171, 11. Prue Vines 'Proximity as principle or category: nervous shock in Australia and England.' (1993) 16 *University of New South Wales Law Journal*, 467.

In *Pham v. Lawson*²²¹, the idea that there is no reason in logic to exclude from recovery those persons who were merely informed of an accident was reinforced. Lander J. referred to the previous case of *Petrie v Dowling*²²² allowing recovery to a plaintiff who had been informed that her daughter had been killed in an accident, and expressed agreement with the opinion of Kirby P in *Coates v Government Insurance Office of New South Wales*²²³ that physical presence at an accident or its aftermath is not required of secondary victims. The emphasis in the judgment is upon the vagueness of the aftermath concept and on the compelling nature of the emotional ties of secondary victims, no matter how they learn of death or injury to a relative or loved one. Reviewing the law, his Honour said that the judgments in *Jaensch v. Coffey*²²⁴ had established that at common law a duty of care will be owed in circumstances where a spouse was not present at the accident, but was later told of the consequences and attended hospital where some of its consequences were perceived personally.

Butler suggests that the significance of this case is that, obiter, a majority of the Court (Lander J, with Bollen J agreeing) was prepared to go on to hold that if the only stressor had been the respondent's being informed of the accident, a duty of care would still have arisen. Any exclusion of such a claim rested in policy rather than in logic. In his opinion, *Pham v. Lawson*²²⁵ represented a widening by Australian appellate court of the net of recovery for psychiatric injury by unendangered bystanders, confirming a trend among judges in Australia to permit recovery where the plaintiff did not perceive the accident or its aftermath and was only informed about the accident and its consequences.²²⁶

In *Annetts v. Australian Stations Pty Ltd.*²²⁷, 18 years after *Jaensch v. Coffey*,²²⁸ the Australian High Court had the opportunity to examine the law pertaining to psychiatric illness and, in particular, the requirement of direct perception.

Mr. and Mrs. Annetts's son was employed as an apprentice worker on the defendant's cattle station in a remote part of Western Australia. The Annetts were assured that their son would be under constant supervision and that he would be well cared for. He was not. After a few weeks, the station manager sent him to work alone at another isolated cattle station, with

²²¹ (1997) 68 SASR 124.

²²² (1992) 1 Qd R 284.

²²³ (1995) 36 NSWLR1.

²²⁴ (1984) 155 CLR 549.

²²⁵ (1997) 68 SASR 124.

²²⁶ Des Butler, 'Pham v. Lawson: widening the sphere for bystander recovery for nervous shock.' (1998) 6 *Torts Law Journal* 5.

²²⁷ (2002) 211 CLR 317.

²²⁸ (1984) 155 CLR, 549.

a defective car and no proper lines of radio communication. On 6 December 1986, the Annetts were informed by telephone that their son had disappeared and suspected that he was in grave danger of injury or death. On being informed of the disappearance on the telephone, Mr. Annetts collapsed. A prolonged search, in which the parents took part, failed to find him, but found his bloodstained hat. Some months later, in April 1987, his body was found in the Gibson desert. It appeared he had died as a result of dehydration, exhaustion and hypothermia. Mr. Annetts was shown photos of skeletal remains which he identified as his son. As a result of these events, Mr. and Mrs. Annetts claimed that the defendants' negligence caused the death of their son and that the same negligence caused them psychiatric injury.²²⁹

The High Court, by majority, held that liability for damages for psychiatric injury is not (and should not be) limited to cases where the injury is caused by a sudden shock to a plaintiff who has directly perceived a distressing phenomenon or its immediate aftermath, even though such factual considerations may be relevant.²³⁰

Justices Gaudron, Gummow and Kirby held that to treat those who directly perceive some distressing phenomenon or its aftermath as the only persons who may recover for negligently caused psychiatric harm is productive of anomalous consequences and limits the categories of claimants other than in conformity with long-established negligence principles.

Justices Gummow and Kirby said that a rule imposing a requirement of geographical or temporal distance of the plaintiff from the distressing phenomenon or on the means by which the plaintiff acquires knowledge of the phenomenon is apt to produce arbitrary outcomes and to exclude meritorious claims. They held that distance in time and space from a distressing phenomenon, and means of communication or acquisition of knowledge concerning the phenomenon, may be relevant to assessing reasonable foreseeability, causation and remoteness of damage, but are not themselves decisive of liability.²³¹

²²⁹ Handford has pointed out that it is not clear why Mr. and Mrs. Annetts were not advised to proceed under the New South Wales statute where mental shock sustained by a very close relative such as a parent or spouse is compensable with no restrictions. Peter Handford, 'When the telephone rings: restating negligence liability for psychiatric illness. *Tame v. Morgan* and *Annetts v Australian Station Pty. Ltd.*' (2001) 23 *Sydney Law Review* 613. In 1944 the New South Wales Parliament created a statutory cause of action for nervous shock. Similar provisions were adopted in 1955 by the Northern Territory and the Australian Capital Territory. Danuta Mendelson, 'The modern Australian law of mental harm: parochialism triumphant.' (2005) 13 *Journal of Law and Medicine*. 164.

²³⁰ The decision was quite unexpected. Even one of the most recognised specialists in nervous shock in the world got it wrong and predicted in 2001 that it was 'going to be hard for the High Court to stretch the aftermath concept far enough to accommodate the facts of *Annetts*.' Handford, above n 222, 612.

²³¹ Handford, above n 188, 19.

The question to be asked, said the Court, is whether it is reasonable to require one person to have in contemplation injury of the kind that has been suffered by another and to take reasonable care to guard against such injury.

According to Handford, by abandoning direct perception and sudden shock, two of the policy requirements which had been imposed by previous pronouncements, and the redefinition of the normal fortitude test, Australia entered a new era.²³² No doubt, this is the most desirable approach: to consider the individual situation, and to ask whether in the circumstances psychiatric injury was foreseeable, keeping artificial exclusionary rules to a minimum.²³³

Trindade suggests that, as five of the seven judges in *Annetts* were in favour of abandoning the direct perception rule, it must be considered as abandoned. It also means that the question whether a plaintiff could recover in a case where reasonably foreseeable psychiatric injury is sustained as a consequence of being told about the death or accident – a question considered open by Deane J. in *Jaensch v. Coffey*, must now be regarded as settled by the high Court in favour of allowing recovery to plaintiffs who suffer a psychiatric illness as a result of being told of the death, injury or imperilment of a loved one caused by an act of the defendant.²³⁴

In essence, in *Annetts*, liability was based on the simple test of foreseeability of psychiatric injury, and issues such as whether there was direct perception or sudden shock were simply factors in the overall foreseeability assessment.²³⁵ It has been submitted that what may have emerged is ‘an open-ended take-into-account-all-the-circumstances rule’, to determine whether, based on those circumstances, the plaintiff ought to recover.²³⁶ Under such a rule, a court might balance the strength of one factor in the plaintiff’s case with a weakness in other. The decision sharpens the division that now exists between the jurisdictions which are prepared to trust the foreseeability approach and those, such as England, where the House of Lords made it harder for plaintiffs to recover for psychiatric injury while paradoxically softening the foreseeability test for one particular class of victim (*Page v Smith*).

²³² Handford, above n 188, 13.

²³³ Handford, above n 222, 614.

²³⁴ Francis Trindade, ‘Case Comment. Reformulation of the nervous shock rules.’ (2003) 119 *Law Quarterly Review* 204, 210.

²³⁵ Peter Handford, ‘Psychiatric injury in breach of a relationship.’ (2007) 27 *Legal Studies* 26, 30. Gummow and Kirby JJ emphasised that the need to show an actual psychiatric illness, as opposed to mere shock, sorrow, etc. operated as a significant control and reduced the scope for indeterminate liability. Todd, above n 24, 182.

²³⁶ Richard Pearson, ‘Liability to Bystanders for Negligently Inflicted Emotional Harm. A Comment on the Nature of Arbitrary Rules. (1982) 34 *University of Florida Law Review* 477, 498. Handford, above n 196, 14.

The conservative opinion of Trindade that the abolition of the direct perception requirement might lead to an escalation in liability for nervous shock unless it is clear that it is only in the case of those who have a close tie (family or of care) with the person killed, injured or put in peril, contrasts with Mullany's conviction that there is no reason to suspect that the current state of affairs would change significantly with the rejection of the told rule.²³⁷

(c) South Africa.

The rejection of the direct perception of event or its immediate aftermath requirement gained the adhesion of the full bench of the South African Supreme Court of Appeal in *Barnard v. Santam Bpk.*²³⁸ A 13 year old boy was killed in a bus accident; the appellant mother suffered psychiatric injury upon being informed by her husband (who had himself received the information from the police) of the death of her son. There was no witnessing of the accident, no recognition of the corpse, no question of aftermath.²³⁹ The damage arose solely as a consequence of the receipt of distressing information.

The facts in *Barnard* were very similar to those in *Reeve v. Brisbane City Council*.²⁴⁰ In spite of the fact that the South African Supreme Court of Appeal did not refer to the Queensland case, Mullany notes that it arrived at the same conclusion: psychiatric injury was a reasonably foreseeable consequence of informing a mother of the death of her son; that relationship was very close and the closer the tie between the primary victim and the traumatised person, the more reasonable the inference that disorder was reasonably foreseeable to the tortfeasor. The means by which trauma came to be appreciated was inconsequential.²⁴¹

The conclusion is logical. As Mullany submits, once it is accepted that the oral communication of distressing news by a third party can be as equally devastating to the recipient as direct personal perception of the subject of the news, it must also be accepted that

²³⁷ Mullany, above n 191, 36.

²³⁸ (1999) S.A. 202

²³⁹ In *Annetts*, the significance of the decision was diminished by Ipp J, saying that in South Africa the law of negligence was based on the Roman *Lex Aquilia*, under which foreseeability was limited only by causation and public policy and proximity played no role. Handford, however, points out that the judgment relies heavily on Australian authorities and seems perfectly in tune with developments in various parts of the common law world. Handford, above n 222, 605. Yega Muthu et alii. 'If I only had a heart. The Australian case of *Annetts* and the international confounding question of compensation in nervous shock law.' (2005) 8 *University of Technology Sydney Law Review*.

²⁴⁰ (1995) 2 Qd. R. 661.

²⁴¹ Mullany, above n 191, 36.

the medium of third party communication is irrelevant. It is the overall context in which bad news is communicated which is important.²⁴²

Trindade, however, seems not to be alone. In effect, the High Court's extension of liability in *Annetts-Tame* raised some alarm and six jurisdictions, in late 2002 and 2003, following the recommendations contained in the Ipp Panel's *Review of the Law of Negligence Report*, legislatively modified the rules for negligently inflicted psychiatric injury established by the Court.²⁴³

1.10 The 'sudden shock' requirement.

1.10.1 The rule in *Alcock*.

In *Alcock*, their Lordships held that in order to be actionable the plaintiff's psychiatric injury must be the consequence of *shock*, in the sense of a sudden assault on the nervous system. Lord Ackner described nervous shock as 'the sudden appreciation by sight or sound of a horrifying event, which violently agitates the mind.'²⁴⁴ Lord Keith required 'a sudden assault on the nervous system.'²⁴⁵ Lord Oliver referred to a 'sudden and unexpected shock to the plaintiff's nervous system.'²⁴⁶ Consequently, psychiatric damage caused by a gradual process over time, like in the example given by Brennan, J. in *Jaensch v Coffey*²⁴⁷ and cited with approval by Lord Oliver²⁴⁸, where the plaintiff is worn down by caring for an injured spouse, will not give rise to liability.²⁴⁹ Also clinical depression attributable to the plaintiff having to live with the fact that a loved one is permanently disabled as a result of the defendant's negligence is not actionable.²⁵⁰

²⁴² Ibid.

²⁴³ Mendelson, above n 222, 165.

²⁴⁴ [1991] 4 All ER at 918.

²⁴⁵ At 398.

²⁴⁶ At 411.

²⁴⁷ (1984) 155 CLR 549 at 565.

²⁴⁸ At 400.

²⁴⁹ There was perhaps support for that principle in the decision of the Full Court of the Supreme Court of Victoria in *Pratt v Goldsmith v. Pratt* (1975) VR 378, but the mother in that claim failed, not because there was not psychological impact, but because this one manifested itself at a time very far from the time of the accident.

²⁵⁰ In *Sion v. Hampstead Health Authority* (1994) 5 Med L.R. 170 the English Court of Appeal struck out a claim by a father for psychiatric illness allegedly caused by sitting at his 23-year old son's bedside for 14 days, as his son gradually deteriorated and eventually died. There was no 'sudden appreciation by sight or sound of a horrifying event, which violent agitates the mind.' There was a process, said the Court, which continued for some time, from the first arrival in the hospital to the appreciation after the inquest, that there may have been medical negligence. The son's death, when it occurred, was not surprising but expected.

In *Beecham v Hughes* (1988) 52 D.L.R. (4th) 625, the plaintiff suffered from reactive depression which began some time after a road accident in which his common law wife sustained severe brain damage, resulting in permanent disablement. On the facts, his depression which developed long after the accident, was held to arise

Lord Oliver said that the common features of all the reported cases of that type decided in England prior to the decision of Hidden J in *Alcock* include the fact that the injury arose from sudden and unexpected shock to the plaintiff's nervous system²⁵¹ 'rather than dawning consciousness over an extended period.'²⁵²

According to Mullany, notwithstanding that, prior to *Alcock*, the requirement of 'sudden shock' had not received express judicial ratification in England, the speeches in that appeal affirmed the need for a sudden assault on the nervous system.²⁵³ In his opinion, their Lordships' suggestion that the requirement was implicit in all previous cases is questionable and qualifies the pedigree of the requirement as cloudy.²⁵⁴

In general, the origin of the 'sudden shock' rule is attributed to the judgment of Brennan J. in *Jaensch*, where he maintained that psychiatric injury had to be 'shock-induced', rather than one 'induced by mere knowledge of a distressing fact'. He explained that while the term 'nervous shock' had long become antiquated, it still had some utility in relation to the damage regarded as warranting compensation. He stressed that the notion of psychiatric illness induced by shock was a compound, rather than a simple idea, its elements being on the one hand psychiatric illness and on the other the shock which causes it. In his opinion, 'shock' meant the sudden sensory perception –that is, by seeing, hearing or touching- of a person, thing or event, which is so distressing, that the perception of the phenomenon affronts or insults the plaintiff's mind and causes a recognizable psychiatric illness.²⁵⁵

In spite of its undeniable influence in *Alcock*, it is not at all clear that other members of the court supported Brennan J's limitation. In fact, the alleged requirement did not even sit comfortably with the facts of the case itself, as Deane J explains that for a few days Mrs. Coffey coped well, and that the first symptoms of her illness did not begin to emerge until about a week later.

Teff maintains that psychiatric injury is by no means exclusively associated with trauma. He believes that though sudden sensory perception may be medically significant in certain situations, as in the horrific scenes associated with exceptional mass disasters, in

not from seeing his wife injured or from the shock of experiencing the accident, but from his subsequent sorrow and inability to accept that she would never be the same person again. Cf. Louise Bélanger-Hardy, 'Négligence, victimes indirectes et préjudice moral en common law: les limites à la réparation se justifient-elles?' (1998) 36 *Osgoode Law Journal*, 412.

²⁵¹ At 411.

²⁵² At 401.

²⁵³ Mullany, above n 191, 36.

²⁵⁴ Ibid.

²⁵⁵ In *Pham v Lawson* (1997) 68 SASR 124, Lander extended the concept so that the 'thing or event' that was to be perceived did not need to be the accident itself, but could also include being told of the accident.

general, it is no more compelling as an indicator of foreseeable psychiatric injury than cumulative shock.²⁵⁶ The requirement, it has been said, is quite simply a nonsense in medical terms, inconsistent with the psychiatric literature and the functioning of the mind,²⁵⁷ and counsel should not be forced in every claim for psychiatric damage to attempt to identify and attribute particular medical significance to a specific event.²⁵⁸

Part of the problem seems to reside in the persistence of the use of the term ‘nervous shock’. Besides the fact that it blurs the distinction between the *cause* of harm and its *nature*, it positively reinforces the misconception that serious psychiatric illness commonly results from an abrupt jolt to the nervous system.²⁵⁹

The reliance on the ‘sudden shock’ concept has been considered questionable. In effect, it is not apparent what the difference is between suffering nervous shock on sudden perception of an accident to a loved one, and suffering the same nervous shock after a suspenseful and probably nerve-wracking wait of nine hours before the worst is confirmed.²⁶⁰ The idea suggested by Lord Oliver was that witnessing the incident from neighbouring stands, knowing that someone very dear was in the affected area but with the uncertainty as to whether or not the loved one was amongst those who were being smashed, could only stimulate anxiety and, therefore, was not sufficient for a claim of negligently inflicted psychiatric illness.

Teff points out that the undesirable distinction between ‘sudden assaults on the nervous’ system and more gradual, cumulative ones has the effect of vitiating manifestly deserving claims when gradual accumulation is so closely identified with the precipitating incident that it constitutes the plaintiff’s experience of it.²⁶¹ Mr. Copoc, for instance, knew that his son was at the Hillsborough match and believed him to be in the danger zone. He and his wife watched the live TV presentation in a state of continuous fear. He made telephone calls until 4.00 am the following morning to no avail, after which he went to Sheffield

²⁵⁶ Harvey Teff, ‘The requirement of ‘sudden shock’ in liability for negligently inflicted psychiatric damage.’ (1996) *Tort Law Review* 46.

²⁵⁷ Peter Handford, ‘Hillsborough replayed.’ (1997) 113 *Law Quarterly Review* 410, 417.

²⁵⁸ Mullany, above n 191, 36.

²⁵⁹ Ibid, 48. Handford, above n 188, 20. ‘The traditional name given to actions for mental injury –claims for nervous shock- is misleading, for the plaintiff seeks damages not for shock but for the damage caused by the shock.’ Todd, above n 24, 182.

²⁶⁰ Eng Beng Lee, ‘Case Comments. Vindication of the three proximities. *Alcock & Ors. v Chief Constable of the South Yorkshire Police.*’ (1992) *Singapore Journal of Legal Studies* 528, 539.

²⁶¹ Teff, above n 249, 447.

looking in vain for his son at the hospital. He finally identified his body at the mortuary on information received from the police. His claim failed.²⁶²

Lord Oliver described such sequence of events as a more elongated and, to some extent, retrospective process²⁶³, therefore, presumably only able to ‘stimulate anxiety’. His Lordships’ description, certainly calls to mind the slow backing of the taxi driver in *King v Phillips* and the caustic comment of Professor Goodhart that ‘it is not immediately obvious why a mother should receive less of a shock when she sees her child being slowly run over, than when it is done rapidly’. Ever since then, it has been unanimously accepted, at least among scholars, that the fact that one claimant’s experience is less protracted than another’s does not mean that the latter has suffered any the less. On the contrary, on an abstract analysis, he will usually suffer more.²⁶⁴ The ‘shock’ requirement represented, no doubt, an undue additional gloss on Lord Wilberforce’s second criterion and, although we may dismiss as spurious Lord Denning’s notorious distinction between the ‘terrifying descent’ of the lorry and the ‘slow backing’ of the taxi, a muted version of it has been given currency by the proclaimed requirement in *Alcock* of sudden, shock-induced injury.²⁶⁵

It is certainly odd that whilst recovery for gradually sustained physical injury has never been in doubt, plaintiffs who suffer mental injury have to have such a hard time. The unreasonable rule undoubtedly reflects the fact that, in its historical development, cases of nervous shock had their origin in situations where the plaintiff sufferer was threatened with physical injury by sudden impact. In effect, all early cases involve single incidents, such as accidents or near misses with trains, horses, or road vehicles. Sudden shock was perceived to be a central element in what happened, and the successful plaintiff’s medical condition was seen as induced by some instantaneous reaction to a specific occurrence. Even in medicine, *shock* was believed to be process or catalyst for the physical injury being compensated, and as such was treated as a synonymous with fright, with its connotations of sudden jolt to the nervous system.²⁶⁶ The early insistence on physical impact and physical presence remains hidden under the ‘shock’ requirement. Maitland would probably have thought that ‘the physical impact rule we have buried, but it still rules us from its grave.’

Teff submits that its endurance in the face of better understanding of mental illness and its relation to shock, suggests that something more is at stake. It is the fear, forcefully

²⁶² Ibid, 448.

²⁶³ [1991] 4 All ER 907, 931.

²⁶⁴ Nasir, above n 120, 709.

²⁶⁵ Teff, above n 119, 47.

²⁶⁶ Des Butler, ‘A ‘kind of damage’: removing the ‘shock’ from *nervous shock*’ (1997) 5 *Torts Law Journal*, 12.

expressed by Lord Oliver, that a legal regime for psychiatric illness which lacked such controls would have to compensate for such ‘ordinary and inevitable incidents of life’ as negligently caused bereavement and the stress and strain suffered from caring for the primary victim over a long period.²⁶⁷ There is, in fact, some consensus that the position was brought about by a conscious (and unfortunate) attempt by the House of Lords to limit liability for nervous shock to a tolerable level, which entailed drawing lines with little reference to logic or fairness. In effect, the law’s current stance effectively penalizes those whose illness involves a more prolonged reaction to an event or events closely connected with the defendant’s negligent conduct.

Certainly it is inconsistent that the law should insist on the fact that an accident must produce a particular sudden affront to the senses and should exclude as irrelevant the fact of the injury, disability or death that it causes, since this is the most lasting and devastating effect of the accident with regards to the plaintiff.²⁶⁸

Lord Oliver himself recognized that while extending recovery to nervous shock created by a more elongated process may seem a logical analogical development, the law in that area, nevertheless, was not wholly logical, and he saw no pressing reason of policy for taking that further step along a road which must ultimately lead to virtually limitless liability.²⁶⁹ Teff argues that Lord Oliver’s unusually pronounced fear of the floodgates opening reflected the particular context of a mass disaster viewed by millions. By contrast, in the case of *primary* victims, there have been strong indications of late that a single shocking event is not required.²⁷⁰

That further step was taken in *Frost v Chief Constable of South York Police*²⁷¹, in what can be seen as the beginning of the end of the sudden shock requirement in England. The fact that the psychiatric injury suffered by five policemen was not instantaneous, but arose as a consequence of prolonged exposure to horrifying and uncontrollable circumstances over a period of many hours did not operate to defeat their claims. In a very significant statement, Henry L.J. said that the length of exposure and the circumstances of the exposure was the trauma that caused the psychiatric illnesses, rather than any sudden and immediate shock.

²⁶⁷ Teff, above n 119, 448. See also *Pham v. Lawson* (1997) 68 SASR 124 at 149, where Lander J (with whom Cox and Bollen JJ. agreed) remarked that the shock requirement ‘is not founded on logic but policy so as to limit the class of persons for whom an action would lie.’

²⁶⁸ Lee, above n 253, 539.

²⁶⁹ [1991] 4 All ER at 932.

²⁷⁰ Teff, above n 119, 53.

²⁷¹ [1998] QB 254.

And he added that ‘the label on the trigger for psychiatric damage is unimportant: what matters is...the fact and foreseeability of psychiatric damage, by whatever process’.²⁷²

It might be significant also that, when that case went to the House of Lords, none of the Law Lords, except Lord Goff, referred to the sudden shock issue. In his dissenting speech, His Lordship emphasized the need to abandon the requirement of nervous shock and to concentrate on the requirement that the plaintiff should have suffered from a recognized psychiatric illness.

1.10.2 The rule in other jurisdictions.

Handford has pointed out that amidst the decisions refusing relief in the absence of sudden impact, a growing body of international case law has emerged where the requirement has begun to be eroded. It may, as Henry L.J. suggested, be rationalised as a permissible expansion of liability based on a more sophisticated understanding of mental illness and its relation to shock.²⁷³

In effect, in *Annetts v Australian Stations Pty. Ltd.*²⁷⁴ the Court, by majority, rejected the need for a person suffering from psychiatric injury as a result of the breach of a defendant's duty of care also to prove that they suffered a ‘nervous shock’ in the sense of a sudden affront to the senses. The fact that the shock was sudden rather than gradual remains relevant as a factor in the overall determination whether psychiatric injury was reasonably foreseeable, but the absence of sudden shock no longer mandates a decision in favour of the defendant.²⁷⁵

Gummow and Kirby JJ. said that the need to establish ‘sudden shock’ is not a settled requirement of the common law of Australia²⁷⁶ and that the requirement should not be accepted as a pre-condition for recovery in cases of negligently inflicted psychiatric illness.²⁷⁷ Gleeson C.J. expressed agreement with that view and Gaudron J. said that ‘no aspect of the law of negligence renders ‘sudden shock’ critical either to the existence of a duty of care or to the foreseeability of a risk of psychiatric injury’. None of the other judges, except Callinan J. who, in dissent on the issue, held that the ‘nervous shock’ rule should remain part of the prerequisites to recovery for psychiatric injury, expressed any disagreement with those views.

²⁷² At 271.

²⁷³ Handford, above n 250, 417.

²⁷⁴ (2002) 76 ALRJ 1348 (HC Aus).

²⁷⁵ Handford, above n 188, 21.

²⁷⁶ At 206.

²⁷⁷ At 213.

For that reason, Trindade submits that the ‘sudden shock’ requirement is no longer part of the common law of Australia in nervous shock cases.²⁷⁸

Similarly, the South African Supreme Court of Appeal has rejected it as ‘outmoded and misleading’. It saw the requirement of ‘sudden shock’ as devoid of psychiatric content and found much merit in focusing on one relevant question only, i.e. whether the claimant had sustained a *detectable* psychiatric injury. If it had transpired that, in fact, Mrs. Barnard’s injury had been sustained in the absence of a shock to her senses, she would not have failed on this basis.

In Singapore, also the High Court allowed for the first time, in *Pang Koi Fa v Lim Djoe Phing*²⁷⁹, a claim for nervous shock as a result of medical negligence. In doing so, it did not limit a claim for shock to the traditional accident impact and aftermath situation where the plaintiff would have witnessed or come upon the aftermath of a sudden horrifying accident and suffered nervous shock as a result.²⁸⁰ The High Court, refusing to demand evidence of shock and, recognising the inequity it can cause where disorder arises gradually, granted recovery to a plaintiff for the consequences of watching her daughter linger on in hospital after negligent surgery until she died three months later.

1.11 The twist in the reasonable foreseeability test.

In *Page v Smith*²⁸¹ the main issue for consideration was whether it was foreseeable that someone in Mr. Page’s position would have suffered psychiatric injury. Related to this was the question whether the plaintiff was a person of ‘normal fortitude’ and whether that was relevant to the foreseeability issue. In other words, although physical injury was foreseeable (even if in the event it did not occur) it had to be decided whether foreseeability of *psychiatric* injury was a separate requirement.²⁸²

Until *Page*, it had long been accepted that, in applying the foreseeability test, the plaintiff was assumed to be a person of normal fortitude, and the issue was whether it was possible to foresee psychiatric injury to a person of normal fortitude. As it has been pointed

²⁷⁸ Francis Trindade, ‘Case Comment. Reformulation of the nervous shock rules.’ (2003) 119 *Law Quarterly Review* 204, 210.

²⁷⁹ (1993) 3 SLR 317.

²⁸⁰ Liu Hern Kuan, ‘Nervous shock – Extending the boundaries’. (1994) *Singapore Journal of Legal Studies* 171.

²⁸¹ [1996] 1 AC 155.

²⁸² Wheat, above n 7, 324.

out, this is not to say that the plaintiff *must be* a person of normal fortitude, but simply that there will be no liability unless psychiatric injury to such a person is foreseeable.²⁸³

Otton J.'s award of damages (£162,153) was overturned by the Court of Appeal on the basis that nervous shock was not a foreseeable consequence of such an accident. Hoffmann L.J., confirming the traditional view that the test of liability for shock is foreseeability of injury by shock, stated that foreseeability of physical injury is neither necessary nor sufficient²⁸⁴ He also added that, for the purposes of foreseeability, the plaintiff must be assumed to be a person of normal fortitude, a requirement with origins in the speech of Lord Porter in *Bourhill v Young*.²⁸⁵

Ralph Gibson L.J. also dismissed the action because he thought that there was not enough evidence that the recurrence of the plaintiff's illness was in fact caused by the accident.

The unanimous decision of the Court of Appeal was authoritatively backed up by several leading cases like *King v Phillips*²⁸⁶, *the Wagon Mound (n°1)*²⁸⁷, *Mount Isa Mines Ltd. v Pusey*²⁸⁸ and *Jaensch v Coffey*.²⁸⁹

However, the House of Lords, by a majority of three (Lord Ackner, Lord Browne-Wilkinson and Lord Lloyd of Berwick) to two (Lord Keith of Kinkel and Lord Jauncey of Tullichettle) reversed the decision of the Court of Appeal, restoring the verdict of the trial judge.²⁹⁰ Whilst the minority ratified the requirement of foresight of psychiatric injury, concluding that the Court of Appeal was correct, the majority (mostly expressed by Lord Lloyd) decided that, as the plaintiff was within the range of foreseeable physical injury, he should be considered a primary victim. In that case, it was enough to show that any personal

²⁸³ Handford, above n 196, 16.

²⁸⁴ [1994] 4 All ER 522, 549.

²⁸⁵ 'It is not every emotional disturbance or every shock which should have been foreseen. The driver of a car or vehicle, even though careless, is entitled to assume that the ordinary frequenter of the streets has sufficient fortitude to endure such incidents as may from time to time be expected to occur in them, including the noise of a collision and the sight of injury to others, and is not to be considered negligent towards one who does not possess the customary phlegm' [1943] AC 92 at 117. Previously, Phillimore J. in *Dulieu v White & Sons* had said: 'It may be (I do not say that it is so) that a person venturing into the streets takes his chance of terrors. If not fit for the streets at hours of crowded traffic, he or she should not go there.' Des Butler, 'Susceptibilities to nervous shock: dispensing with the mythical 'normal person''. (1997) 1 *Macarthur Law Review* 109.

²⁸⁶ [1953] 1 QB 429, per Denning at 441.

²⁸⁷ [1961] AC 388 at 466.

²⁸⁸ (1970) 125 CLR 383 per Windeyer at 402.

²⁸⁹ (1984) 155 CLR 549, per Brennan J. at 566 and Deane J. at 604.

²⁹⁰ Some authors pointed out that the decision in *Page v Smith* is in marked contrast with an earlier unreported Court of Appeal decision *Nicholas v Rushton*, 29 April 1992. The facts were similar to those in *Page* where the plaintiff was involved in a car collision. She did not suffer any bodily injuries and was able to drive away after the incident. Later she claimed damages for nervous shock and her claim was dismissed by the Court of Appeal. Susanna Leong Huey Sy and Leng Ter Kah, 'Negligence liability to primary victims of psychiatric illness.' (1996) 8 *Singapore Academy of Law Journal* 214.

injury, whether physical or psychiatric, to the plaintiff was foreseeable. The defendant was liable even if no physical injuries were sustained and the only damage suffered by the claimant was purely psychiatric damage.²⁹¹ Absence of foreseeability of shock-induced psychiatric illness was no longer fatal to claims. The test of reasonable foresight of psychiatric injury, till then considered all embracing, was henceforth applicable only to secondary victims.²⁹²

Mullany notes that the majority's distinction between the two kinds of claimant, contrary to countless common law cases, cannot be supported by principle or logic,²⁹³ and is simply an incorrect analysis to suggest that all of the authorities endorsing a foreseeability of injury by shock test were not concerned with primary victims.²⁹⁴

By rejecting the traditional notion that foreseeability of psychiatric injury is required in all cases, and stating instead that, where the plaintiff is personally endangered and within the area of foreseeable physical risk, all that is required is that some physical injury be foreseeable, the House of Lords was, as Handford put it, 'rewriting some cardinal principles of the law of psychiatric damages.'²⁹⁵ Most of all, there is a lack of convincing justification of why, if a person physically injured in an accident has to prove that such injury was a reasonable foreseeable consequence of the tortfeasor's negligence, another, psychiatrically injured, should be excused from proving that his or her condition could and should have been foreseen.²⁹⁶

As it was pointed out, the direction signalled by *Page v. Smith*²⁹⁷ is backwards, not forwards: absent a close relationship between the claimant and the injured victim, the emphasis is once again on physical proximity and personal danger as it was in the early days, even though in the interim it has been recognised that injury by shock is a different kind of injury from injury by impact.²⁹⁸

²⁹¹ C.A. Hopkins, 'A new twist to nervous shock' (1995) 54 *Cambridge Law Journal* 491.

²⁹² Handford, above n 250, 410.

²⁹³ Nicholas Mullany 'Psychiatric damage in the House of Lords –Fourth time unlucky: *Page v Smith*.' (1995) 3 *Journal of Law and Medicine* 112, 117. Others, however, believe that as it is well established that the law of torts draws a strict distinction between liability to primary victims and that to secondary victims, it is strongly arguable that the dicta in those cases are not directly applicable to the case of a primary victim such as the plaintiff in *Page v. Smith*. Barbara Mc Donald and Jane Swanton, 'Foreseeability in relation to negligent infliction of nervous shock'. (1995) 69 *Australian Law Journal* 945, 946.

²⁹⁴ Mullany *ibid*, 113. Handford, above n 222, 601.

²⁹⁵ Handford, above n 96, 5.

²⁹⁶ Mullany, above n 285, 116.

²⁹⁷ [1996] 1 AC 155.

²⁹⁸ Handford, above n 22, 31. A few United States jurisdictions are still prepared to endorse the alternative of the zone of physical danger, see. Joseph Matye, 'Bystander recovery for negligent infliction of emotional distress in Missouri.' (1991) 60 *University of Missouri Kansas City Law Review*, 169 et ss. Tureau, above n 25, 1005 et ss.

Mullany and Handford stress that Lord Lloyd saw no need to complicate a trivial car accident by requiring foresight of psychiatric illness, rather than just physical harm, and felt that it would not be sensible, in an age when medical and psychiatric knowledge were expanding fast, ‘to commit the law to a distinction between physical and psychiatric injury, which may already seem somewhat artificial, and may soon be altogether outmoded’. Handford, in particular, remarks that it might be asked why, when the plaintiff had been deprived of the capacity to work and had suffered loss quantified by Otton J at £ 162, 153, and the defendant was presumably insured should the attempt to compensate the plaintiff for his loss be frustrated by the need to show that psychiatric injury, rather than any other sort of personal injury, was foreseeable?²⁹⁹

Although the decision may be commendable in the sense that it makes it easier for one group of psychiatric injury sufferers to recover, and that it lends support to the notion that psychiatric illness need not be treated any differently from physical harm, it does so by stressing the purely geographical consideration of whether the plaintiff was within the range of physical injury. To say the least, it represents a source of desorientation which justifies its unenthusiastic reception outside the UK.³⁰⁰

1.12 Reasonable foreseeability: prospectively or *ex post facto* ?

An additional complicated issue is whether the test of reasonable foreseeability should be applied prospectively or *ex post facto*, that is, the defendant should apply his mind to the position immediately before the accident, or what actually occurred should be taken into consideration? Witting suggests that the question thus becomes whether psychiatric injury was foreseeable as the result of *an* accident, or as the result of *this* particular accident.³⁰¹

²⁹⁹ Handford, above n 96, 8.

³⁰⁰ Cf. Todd, above n 24, 187. Nicholas Mullany and Peter Handford, ‘Moving the boundary stone by statute. The Law Commission on Psychiatric illness.’ (1999) *University of New South Wales Journal* 2. In another article, Handford insists that Lord Lloyd may have been trying to soften the hurdle to be surmounted by those within the sphere of physical danger, but that his rigid exclusion from the more favourable primary victim regime of anyone not within the zone of physical danger has had unfortunate consequences for rescuers, involuntary participants, employees and others. Handford, above n 231, 610. And more recently, the same author says that ‘the case can perhaps be seen as a well-meaning attempt to extend liability to deserving plaintiffs who were perhaps not well served by the previous law...however, Lord Lloyd’s judgment has had the opposite effect of narrowing the law because of the implication that to be a primary victim one must be within the area of potential physical danger’. Handford, above n 227.

³⁰¹ Christian Witting, ‘A primer on the modern law of ‘nervous shock’. (1998) 22 *Melbourne University Law Review* 71.

In *Page v Smith* the majority took the view that foreseeability was to be judged prospectively in relation to primary victims,³⁰² that is, what was reasonably foreseeable by the defendant before the event. With secondary victims, on the other hand, the foreseeability test is applied *ex post facto*. Lord Lloyd, favouring the approach of the trial judge, explained that the need of the *ex post facto* test is that ‘if one did not know the outcome of the accident or event, it is impossible to say whether the defendant should have foreseen injury by shock. It is necessary to take account of what happened in order to apply the test of reasonable foreseeability at all.’³⁰³ However, His Lordship, stressing once more his schizophrenic view of the law towards psychiatric harm, said that, in the case of a primary victim it was neither necessary, logical, nor just and that ‘to introduce hindsight into a trial of an ordinary running-down action would do the law no service.’³⁰⁴ In his opinion, it could not be right that a negligent defendant should escape for psychiatric injury just because, though serious physical injury was foreseeable, it did not in fact transpire.³⁰⁵

In his dissent, Lord Jauncey adopted Lord Wilberforce’s approach in *McLoughlin v. O’Brian*³⁰⁶ and said that

‘Foreseeability, which involves a hypothetical person, looking with hindsight at an event which has occurred, is a formula adopted by English Law, not merely for defining, but also for limiting the persons to whom duty may be owed, and the consequences for which an actor may be held responsible. It is not merely an issue of fact to be left to be found as such.’³⁰⁷

His Lordship argued that failing to consider the matter *ex post facto* could lead to a situation where, because the plaintiff could have claimed damages if he had suffered one kind of harm, he could now have damages for the harm he does actually suffer.

With his habitual precision, Mullany explains that liability for all personal injury, whether physical or psychiatric, ought to be based on what the tortfeasor could reasonably foresee just prior to his action. He considers obvious that the court has to assess culpability by reference to what has happened, because if you do not know the outcome of an accident it is impossible to determine whether what occurred should have been foreseen. However, he also points out that this judicial use of hindsight is completely different from attributing the defendant knowledge of the peculiarities of an accident before it takes place and to inquire

³⁰² Francis McManus, ‘Nervous shock. Back to square one?’ (1996) 2 *Judicial Review*, 160.

³⁰³ [1995] 2 WLR.

³⁰⁴ At 649.

³⁰⁵ At 667. It has been considered arguable that this, at least in its form of expression, is taking an inappropriate *punitive* view of compensation in the law of negligence. Wheat, above n 7, 324, note 52.

³⁰⁶ [1983] 1 AC 410.

³⁰⁷ At 420.

whether, knowing these details, the injury sustained could and should have been anticipated.³⁰⁸ It is in the nature, the essence and the logic of foreseeability as a substantial element to determine liability that the only thing that can be demanded from a tortfeasor is to abstain from actions whose damaging consequences can be recognised in advance.

Lord Goff, in his dissenting judgment in *Frost v Chief Constable of South Yorkshire*³⁰⁹, after labelling *Page v Smith*³¹⁰ ‘a remarkable departure from generally accepted principles’, subjected Lord Lloyd’s views to unusually scathing criticism coming from one member of the House to another. He emphasized that Lord Lloyd had departed from the previous understanding of the law in a number of respects and ‘had dethroned foreseeability of psychiatric injury from its central position as the unifying feature of this branch of the law’. He claimed that his approach was inconsistent with the adoption by Viscount Simonds in *The Wagon Mound* of Denning LJ’s statement of principle and with the actual reasoning of the Privy Council in that case. His Lordship finally said that Lord Lloyd’s exclusion of hindsight where the plaintiff is a primary victim also appeared to be a departure from the law as previously understood, emphasizing that Lord Lloyd gave no reason for this departure.

The final result in *Page* is a particularly favourable position for primary victims, justified under the laudable attempt to commit the law, in harmony with medical knowledge, to the equal protection of physical and mental injury. Unfortunately, as it has been submitted, *Page* does not fit with medical understanding of the causes of psychiatric harm. In effect, the mere fact that a trivial physical injury has occurred is not an indicator for developing a psychiatric reaction.

Mullany advocates that although expressly stated in *Page v Smith*³¹¹ that the fear of psychiatric injury suits justifies the control mechanisms imposed on secondary victims, the reality is that the prospects of litigation and the number of appeals has increased as counsel strive to promote plaintiffs to the primary position.³¹² Teff agrees and suggests that as regards primary victims, one can now anticipate more litigation over road accidents in which only psychiatric injury has occurred, for though at least minor physical harm will commonly have been foreseeable in such accidents, none materialise, especially as car safety improves.³¹³

³⁰⁸ Mullany, above n 285, 116.

³⁰⁹ [1998] QB 254.

³¹⁰ [1995] 2 All ER 736.

³¹¹ [1995] 2 All ER 736.

³¹² Nicholas Mullany, ‘English psychiatric injury law – Chronically depressing,’ (1999) 115 *Law Quarterly Review* 30-36.

³¹³ Teff, above n 8, 112.

1.13 The ‘normal fortitude’ requirement.

1.13.1 Generally.

In *Page v Smith*, Lord Lloyd, after emphasizing that *Bourhill v Young*³¹⁴ was only concerned with a secondary victim, said that there was nothing in that case to displace the ordinary rule that where the plaintiff is within range of foreseeable physical injury (which Mrs. Bourhill was not) the defendant must take his victim as he finds him, and concluded that in the case of a primary victim it is not appropriate to ask whether he is a person of ‘ordinary phlegm’. He maintained that in the case of physical injury there was no such requirement: the negligent defendant, or more usually his insurer, takes his victim as he finds him and he suggested that the same should apply in the case of psychiatric injury. Finally, His Lordship pointed out that,

There is no difference in principle, as Geoffrey Lane J. pointed out in *Malcolm v. Broadhurst* [1970] 3 All ER 508 between an eggshell skull and an eggshell personality. Since the number of potential claimants is limited by the nature of the case, there is no need to impose any further limit by reference to a person of ordinary phlegm. Nor can I see any justification for doing so.³¹⁵

However, as Wheat acutely observes, that ‘ordinary rule’ had, until then, applied only to cases of physical injury, because rightly or wrongly, psychiatric injury had always been treated differently, requiring specific foreseeability.³¹⁶

Lord Jauncey, in dissent, considered Lord Porter’s dictum in *Bourhill v Young*³¹⁷ to be ‘still acceptable in 1995’ and dismissed the claim on the basis that the plaintiff’s injury could only be attributed to his peculiar sensitivity.³¹⁸ Lord Keith, also in dissent, thought that a person with reasonable strong nerves would be capable of withstanding a minor accident, such as the one suffered by Mr. Page, with psyche intact.

Mullany strongly criticizes the exclusion of the unusually sensitive from the protection offered by the law of negligence, which he maintains ‘has always been, and remains unacceptable.’ The normal susceptibility standard in psychiatric damage cases, he says, seems irreconcilable with the general rule of negligence that tortfeasors must take their

³¹⁴ [1943] AC 92.

³¹⁵ [1995] 2 All ER 736. In *Malcom v. Broadhurst* a woman suffered head injuries in a car accident which exacerbated a pre-existing nervous disorder.

³¹⁶ Wheat, above n 7, 324. Lord Goff in his dissenting in *Frost* also observed that it appeared from the passage from Lord Wright’s opinion in *Bourhill v Young*, that that was not the ordinary rule. ‘The maxim only applies where liability has been established. The criticism is therefore that Lord Lloyd appears to have taken an exceptional rule relating to compensation and treated it as being of general application, thereby creating a wider principle of liability.’

³¹⁷ [1943] AC 92.

³¹⁸ At 657.

victims as they find them.³¹⁹ In his powerful article, Mullany submits that the exceptionally sensitive (whose existence may certainly be foreseeable) should recover irrespective of whether the average member of the community would have been similarly afflicted and irrespective of whether the plaintiff was involved in the trauma, was an onlooker or was informed of it later.³²⁰

In a complete opposite view, Weir doubts whether it is really sensible to equate thin skins and thin skulls.

Vulnerability to physical lesion is pretty standard throughout the population –a force that would wound you would wound me, too- but the range of psychic liability is very great indeed- a quite minor accident can throw one person into a serious decline (*Brice v Brown* is the outrageous instance) and leave another unaffected. This being so, can it be right simply to transpose to the mental sphere the idea ‘you take your victim as you find him’?³²¹

It has been argued that fault liability looks to a defendant’s culpability as the basis for concluding that the defendant *ought* to be held responsible and therefore *ought* to pay compensation for the claimant’s harm. Culpa involves foresight of harm and, therefore, the defendant’s foreseeability should relate to the harm that the claimant has actually suffered and not merely foresight of *any* damage that might have been caused by the defendant’s conduct.³²² Defendants should only be liable for that which they can reasonably foresee and therefore take steps to avoid. This is a fundamental tenet of negligence law.³²³

Two additional arguments should be considered: First, even accepting that the development of a psychiatric illness was a foreseeable risk, the question that still remains would be to what extent did the defendant actually contribute to the illness which followed the collision. Witting suggests that the correct approach was taken by Lee J in *Harrison v Suncorp Insurance & Finance*³²⁴ where it was held that the plaintiff’s predisposition towards schizophrenic-related illnesses, although not significant enough as to break the chain of

³¹⁹ Mullany, above n 285, 118.

³²⁰ Ibid, 119.

³²¹ Tony Weir, ‘Book reviews.’ (1993) 52 *Cambridge Law Journal* 521. Jones argues that even if psychiatric damage can be as disabling as physical injury, it is sensible to treat it as a different type of damage, since that is how it is conceived of by lay people, and the common law should pragmatically reflect the understanding of the common man, appropriately informed by expert opinion. However, he suggests that the test for liability in both cases (with or without physical injury) should be foreseeability of psychiatric damage. Jones, above n 94, 113. Professor Todd recognises both, that the decision in *Page* holding that psychiatric injury to primary victims need not be foreseeable has its supporters, as well as that it has also been castigated as lacking in authority and contrary to fundamental principle. Todd, ‘Psychiatric injury and rescuers.’ (1999) 115 *Law Quarterly Review* 345, 350.

³²² Jones, above n 95, 125.

³²³ Mullany, above n 286, 116.

³²⁴ Unreported, Supreme Court of Queensland, Lee J, 12 December 1995.

causation, should have an impact on the assessment of his damages.³²⁵ Also Donovan J in *Dooley v Cammell Laird & Co Ltd*³²⁶ considered the existence of a pre-accident neurasthenia, which was worsened and accelerated by the accident, as irrelevant to the question of liability, although it did influence the assessment of damages issue, leading to a reduction in the award by two thirds.

Jones agrees that, in theory, if psychiatric symptoms are attributable to several different causes, of which the negligence of the defendant is merely one, then it would be logical to attempt to apportion liability accordingly. In practice, however, he says, it seems that this has rarely been done since the principle that the claimant establishes causation if it is proved that the defendant's negligence has materially contributed to the damage has been understood to mean that the claimant succeeds in full.³²⁷

The second argument points out that, even admitting the existence of a duty of care, there can still be great difficulty in determining whether Smith was in fact in breach of that duty. Applying the principle stated in *Hughes v. Lord Advocate*³²⁸ to the facts in *Page*, a Scottish commentator submits that that question would turn on whether or not the recurrence of the plaintiff's illness was a reasonable consequence of Smith's careless driving. He argues that since personal injury was *ex hypothesi* reasonably foreseeable as a probable consequence of the defendant's negligence, the question is whether personal injury is restricted to direct physical harm or includes psychiatric illness caused by nervous shock. If the latter, there is a breach of duty, as personal injury is foreseeable as a reasonable and probable consequence of the defender's actions. But, if psychiatric illness caused by nervous shock is not regarded as personal injury, then it follows that before there is a breach of duty, psychiatric illness must be foreseeable as a probable consequence of the defendant's conduct. Merely to foresee a different kind of injury, direct physical harm, is not enough to satisfy *Hughes*.³²⁹

The House took a short-cut. It simply applied *The Wagon Mound*, requiring foreseeability of the *kind* of damage, while refraining from classifying the *kind* of damage as either psychiatric or physical (a categorisation certainly not easy to establish on the facts).³³⁰ In effect, the central discussion of Viscount Simond's statement in *The Wagon Mound* (*n° 1*)

³²⁵ Witting, above n 294, 86.

³²⁶ [1951] 1 Lloyd's Rep. 271.

³²⁷ Jones, above n 95, 135. In *Rahman v Arearose Ltd* [2001] QB 351, 363 (CA) the test put forward was whether there was any rational basis for an objective apportionment of causative responsibility. Todd, above n 24,944.

³²⁸ (1963) S.C. (H.L.) 31.

³²⁹ Joe Thomson, 'Page v. Smith – A Scottish footnote.' (1996) 112 *Law Quarterly Review*, 383.

³³⁰ Jenny Steele, 'Case and Comment. Pleural plaques in the House of Lords: the implications for *Page v Smith*.' (2008) *Cambridge Law Journal* 29.

that ‘the essential factor in determining liability is whether the damage is of such a kind as the reasonable man would have foreseen’³³¹ was devalued by Lord Lloyd pointing out that Viscount Simonds did not attempt to define what he meant by ‘kind of damage’, and that the concept was too elusive; in his opinion, this was a masterpiece of understatement when one considers the difficulty of reconciling the narrow, defendant-favourable, interpretations of *kind* or *type* in some cases with the broad, plaintiff-favourable interpretations in some others.

In a powerful article, Mullany submits that this is, at best, a strained interpretation, and that there is no basis to question the scope of Viscount Simonds’ ratification of what was clearly seen as an all-purpose test for personal injury actions. He concludes that the entrenchment of the general *shock* theory in English law cannot be dismissed as the by-product of unjustified observations and consequent distortion of principle.³³²

It is true that there has been no definite statement as to what constitutes a *type* of damage and, in particular, no statement that all forms of personal injury constitute a single type of damage so that if personal injury of any kind is foreseeable then any resulting personal injury is recoverable. The explicit reference of Lord Lloyd that there is no justification for regarding physical and psychiatric injury as different ‘kinds’ of injury³³³ is in clear contradiction with Lord Ackner’s speech in *Alcock*, three years earlier³³⁴, that nervous shock cases are a type of claim in a category of its own, no longer a variant of physical injury, but a separate kind of damage.³³⁵ But to astonish the observer, Lord Ackner himself agreed with Lord Lloyd in *Page*!³³⁶

Noble questions Lord Lloyd’s meaning in denying a difference between physical and psychiatric damage. Does it mean that the rule requiring the damage to be of the same type as that foreseen is abrogated, or are we returning to the very wide categories of damage, whereby the foresight of personal injury as opposed to property or financial damage will

³³¹ [1961]AC 388, 426. ‘It is vain to isolate the liability from its context and to say that (the defendant) is or is not liable, and then to ask for what damage he is liable. For his liability is in respect of that damage and no other. If, as admittedly it is, (the defendant’s) liability depends on the reasonable foreseeability of the consequent damage, how is that to be determined except by the foreseeability of the damage which in fact happened –the damage in suit? And, if the damage is unforeseeable so as to displace liability at large, how can the liability be restored so as to make compensation payable?’ At 425.

³³² Mullany, above n 286, 115.

³³³ At 190.

³³⁴ Jones, above n 95, 126.

³³⁵ [1992] 1 AC 310 (HL) at 400.

³³⁶ Mullany says that Lord Ackner’s shift of position is striking when only three years ago he proceeded on the basis that foresight of mental injury by shock was essential. Above n 286, 115.

suffice? Or are we merely saying that in primary cases, psychiatric damage is foreseeable to normal people, and the defendant must take the plaintiff as he finds him?³³⁷

As a whole, *Page* has been considered an unfortunate decision³³⁸, a source of confusion, an unhelpful contribution to the duty debate and has had generally unenthusiastic reception outside the UK.³³⁹

1.13.2 The rule in other common law jurisdictions.

(a) Canada.

The Supreme Court of Canada has only very recently considered, for the first time, the issue of psychiatric damage in *Mustapha v Culligan of Canada Ltd.*³⁴⁰ On November 21, 2001 an incident occurred in the home of Mustapha family, in Windsor, Ontario that shattered Mr. Mustapha's life. In the course of replacing an empty bottle of Culligan water, he and his wife saw a dead fly and part of another dead fly in the fresh, unopened replacement bottle. Mr. Mustapha became obsessed with thoughts about the dead fly in the water to the point where he began to suffer from a major depressive disorder with associative phobia and anxiety. He brought an action against the water supplier, Culligan of Canada Limited.

The key aspect of the foreseeability issue addressed in the *Mustapha* case concerned whether the determination to be made should be based on the plaintiff's particular vulnerability to injury, or whether a more objective standard should be applied.

The trial judge found that the psychiatric effect of the incident was due to Mr. Mustapha's particular sensibilities. Although his reaction was "objectively bizarre", his particular circumstances, along with Culligan's knowledge that the nature of its product indicated a concern for purity and cleanliness, made psychiatric injury from the incident foreseeable for Mr. Mustapha. Culligan was found liable for the damages arising from and in relation to Mr. Mustapha's psychiatric illness, as diagnosed, and damages were assessed.

The Ontario Court of Appeal overturned the judgment on the basis that the injury was not reasonably foreseeable and hence did not give rise to a cause of action

³³⁷ Magaret Noble, 'Remoteness of damage' (1995) 29 *Law Teacher*, 378.

³³⁸ Peter Handford, 'Psychiatric injury in the work place.' (1999) 11 *Tort Law Review*, 128.

³³⁹ Todd, above n 24, 187.

³⁴⁰ (2008) S.C.C. 27.

The Supreme Court held that the plaintiff's damages were too remote to allow recovery. As the manufacturer of a consumable good, the defendant owed Mr. Mustapha, the ultimate consumer of that good, a duty of care in supplying bottled water to him, and it breached the standard of care by providing the plaintiff with contaminated water. The requirement of personal injury, which includes serious and prolonged psychological injury, was also met: the plaintiff suffered a debilitating psychological injury which had a significant impact on his life. However, there was no evidence that a person of ordinary fortitude would have suffered injury from seeing the flies in the bottle. Instead of asking whether it was foreseeable that the defendant's conduct would have injured a person of ordinary fortitude, the trial judge had applied a subjective standard, taking into account Mr. Mustapha's "previous history" and "particular circumstances", including a number of "cultural factors" such as his unusual concern over cleanliness, and the health and well-being of his family. The Supreme Court said that it was an error to apply a subjective standard. The judgment has clarified that in personal injury claims in Canada, when the evidence before the court is that a person of ordinary fortitude would not have suffered injury, the plaintiff's action will fail.

(b) Australia.

In *Tame v New South Wales*³⁴¹, the plaintiff was involved in a motor vehicle collision with a Mr. Lavender. Each driver was subjected to a blood test. Mrs. Tame was free of alcohol. Mr. Lavender had a level of 0.14. By an unhappy mistake, a police officer recorded the plaintiff's blood alcohol content on a report as 0.14. The error was corrected within a month but a copy of the uncorrected report had gone off to the insurers. A year later, the plaintiff learnt of the error from her solicitor and began to worry that people might believe she had been drinking heavily before the accident and that this would have a detrimental effect on her reputation. She became obsessed by the error and developed a psychotic depressive illness. She sued for the psychiatric injury allegedly suffered.

The High Court upheld the Court of Appeal's decision, stating that it was not reasonably foreseeable that a person of normal fortitude would sustain psychiatric injury from a clerical mistake of the kind involved in the accident report form.

The majority rejected the notion that the normal fortitude of a plaintiff needs to be established as a separate independent test of liability. Nonetheless, it was accepted that the

³⁴¹ (2002) 211 CLR 317.

notion of ‘ordinary fortitude’ in many cases will have continuing relevance as a convenient means of determining whether a risk of psychiatric injury is foreseeable³⁴², or a postulate which assists in the assessment, at the stage of breach, of the reasonable foreseeability of the risk of psychiatric harm.³⁴³

A further case in recovery for psychiatric injury in Australia is *Gifford v Strang Patrick Stevedoring Pty Ltd*.³⁴⁴ In the course of his employment, Mr Gifford was killed when a forklift reversed over him, crushing him to death immediately. His estranged wife and children were informed of the accident later the same day. They did not see the deceased's body. The Gifford children did not live with the deceased but maintained a close and loving relationship with him, with Mr Gifford visiting them almost daily.

In that case the High Court, in what represents the demise of proving closeness of relationship, ruled that an employer owes a duty of care to avoid psychiatric injury to the children of its employees. The majority confirmed that absence of normal fortitude was irrelevant.

1.14 Bystanders.

Psychiatric injury suffered by bystanders unconnected with the primary victim would not ordinarily be reasonably foreseeable. Some dicta in *Alcock*, however, suggested that there may be other circumstances in which a mere bystander will be owed a duty of care. The precise nature of these circumstances is not entirely clear since the language used by different members of the House of Lords is not the same.³⁴⁵ Lord Keith³⁴⁶ contemplated the possibility that a bystander who suffered psychiatric illness after witnessing a ‘particularly horrific’ catastrophe close to him (therefore suggesting propinquity to the catastrophe) might be entitled to claim damages from the person whose negligence caused the catastrophe. Lord Oliver talked of circumstances of such horror as would be ‘likely to traumatize even the most phlegmatic spectator.’³⁴⁷ Lord Ackner, in similar words, referred to a situation ‘that a reasonably strong-nerved person would have been so shocked.’ To illustrate the use of his

³⁴² At 62 per Gaudron J.

³⁴³ At 189 per Gummow and Kirby.

³⁴⁴ (2003) 214 CLR 269.

³⁴⁵ For some interpretations see, David Oughton and John Lowry, ‘Liability to bystanders for negligently inflicted psychiatric harm.’ (1995) 46 *Northern Ireland Legal Quarterly* 18, 23.

³⁴⁶ At 397.

³⁴⁷ At 416 on the basis of ‘circumstances of such horror as would be likely to traumatise even the most phlegmatic spectator.’

principle, he gave the example of a petrol tanker crashing into a school and bursting into flames as one in respect of which a reasonably strong-nerved person may suffer psychiatric illness.³⁴⁸

Jones has pointed out that it is not clear how a bystander could be regarded as being foreseeably affected in these hypothetical circumstances when their Lordships concluded that *relatives* of the primary victims who were present in the stadium were not within the reasonable contemplation of the defendant in *Alcock* as they watched the catastrophic events at Hillsborough unfold. He also points out the uncertainties in relation to what amounts to a sufficiently 'horrific event' and to the peculiarities that a specific event must have to satisfy the test. Is it the number killed or injured?³⁴⁹ The age of the primary victims (children conferring the status of greater horror)? The amount of blood or the number of limbs strewn around the scene?³⁵⁰ Certainly, Lord Ackner's speculation did not explain how could it be acceptable for relatives to be denied compensation on the basis of the lack of strength of the emotional tie when, in some circumstances, even a bystander may be entitled to claim.³⁵¹

In *McFarlane v. EE Caledonia Ltd.*³⁵² a painter on the Piper Alpha oil rig, while off duty and resting in his living accommodation on board of a support vessel nearby, suffered psychiatric harm when he witnessed, the atrocious conflagration and collapse of the rig after a series of massive explosions. He witnessed the explosions for almost two hours before he was evacuated by helicopter. 167 men died in the accident, including three rescuers. The closest the plaintiff came to the disaster was 100 meters, when the vessel moved towards the rig to render assistance.

At first instance, Smith J held that the plaintiff was owed a duty of care on the ground that he was a participant in the event who had been in fear for his life. In the Court of Appeal it was held that a person was a participant who feared injury to himself if: (a) he was in the actual area of danger created by the event, and escaped physical injury by chance or good fortune; (b) he was not actually in danger, but because of the sudden and unexpected nature of the event he reasonably thought he was; or (c) he was not originally within the area of danger but came into it later, in which case if he came as a rescuer he could recover. The

³⁴⁸ At 403.

³⁴⁹ In relation to the number of victims, Woollard stresses that the law would be an ass if it allowed a plaintiff to recover after witnessing the death of 40 people in a coach crash, but not after seeing the death of a single motorcyclist. Woollard, above n 176, 123.

³⁵⁰ Michael A. Jones, 'Liability for psychiatric illness – More principle, less subtlety?' (1995) 4 Web JCLI 5.

³⁵¹ Christian Witting, 'A primer on the modern law of 'nervous shock.' (1998) 22 *Melbourne University Law Review* 62, 81.

³⁵² [1994] 2 All ER 1.

plaintiff did not qualify under any of these heads. The support vessel was never close enough to the scene to be within the actual area of danger³⁵³ and the plaintiff was not a rescuer either. He had been part of the non-essential personnel on the rescue vessel. He was not actively involved in the rescue operation, and although he provided some minor assistance, it was considered too peripheral to be regarded as rescue effort.³⁵⁴

In spite of the fact that the plaintiff was not in the position of a rescuer, he did, however, fear, as an employee of the defendants, for the safety of the victims on the rig as his workmates. In *Dooley and Mount Isa*³⁵⁵ this had been previously held to be another sufficiently close non-familial relationship for the recovery of the nervous shock. However, neither the trial court or the Appeal Court appear to have considered this relationship with the victims as a possible basis for the plaintiff's claim.³⁵⁶

In *Alcock*, Lord Keith³⁵⁷, Lord Ackner³⁵⁸ and Lord Oliver³⁵⁹ had left the door open for allowing recovery for bystanders who view scenes of exceptional horror.³⁶⁰ So, if the plaintiff in *McFarlane* did not have any relationship whatsoever with the victims, he was, at the very least, a bystander to their plight, which was undeniably horrendous. Therefore, the plaintiff alternatively submitted that he could recover as a bystander, based on the exceptionally horrific nature of the events in question.

Contrary to the *obiter dicta* in *Alcock*, however, the Court held that witnessing at close range the 'horrific catastrophe' of the Piper Alpha oil rig disaster was not sufficient for a bystander to succeed. Stuart Smith LJ held that

both as a matter of principle and policy the Court should not extend the duty to those who are mere bystanders or witnesses of horrific events unless there is a sufficient degree of proximity, which

³⁵³ The decision was taken despite the fact that evidence accepted by the trial judge showed that the heat was intense, the noise was deafening, the sea was on fire, the captain of the vessel admitted that the ship came very close to being in danger, and that officers in the control room had fallen to the floor when a fireball came towards the ship. Oughton and Lowry, above n 338, 20.

³⁵⁴ In fact this seems to have been crucial to the fate of the case. The plaintiff, together with other –non-essential personnel, was urged to take shelter in or behind the helicopter hangar. Mr. McFarlane did not do so. Instead, he went on deck to watch the conflagration. He was not involved in the rescue operation, except when he helped to move blankets for the expected casualties, and possibly assisted two walking injured as they arrived on the *Tharos* in a dazed state.

³⁵⁵ (1970) 125 CLR 383. Handford refers that that decision of the High Court of Australia has never been questioned in that jurisdiction and that decisions elsewhere suggest that the Australian view may well receive support. Peter Handford, above n 228, 38. E. Coppins, 'Psychiatric injury in employment.' (1997) 8 *Auckland University Law Review* 387, 387.

³⁵⁶ Tan Keng Feng, 'Nervous shock: bystander witnessing a catastrophe.' (1995) 111 *Law Quarterly Review* 50.

³⁵⁷ [1992] 1 AC 310 at 397.

³⁵⁸ At 403.

³⁵⁹ At 413.

³⁶⁰ The expression 'particularily horrific incident' is vague enough to doubt whether it refers to the number of casualties, or the size of the incident, or the type of injuries suffered by the victims. Woollard, above n 176, 123.

requires both nearness in time and place and a close relationship of love and affection between plaintiff and victim.³⁶¹

The assertion insisted on two pre-conditions to a successful action. First, temporal and spatial proximity to the catastrophe. Secondly, a close relationship of love and affection between the plaintiff and the primary victim, consequently circumscribing severely the number of potentially successful litigants.

Oughton and Lowry point out that, if a relationship of love and affection exists, the plaintiff is no longer a *mere* bystander, since, by definition, a *mere* bystander is someone who does not have such a relationship with the primary victim.³⁶² Besides, the statement was in contradiction with a number of sources which indicated that there was no reason, in principle, why a duty of care should not be owed to a spectator.³⁶³ In the light of those sources, it appeared that Stuart-Smith LJ was wrong *in principle* to hold that no duty of care could be owed to a mere bystander.³⁶⁴

Although Stuart-Smith made no specific mention to any precedent, it has been submitted that the only conceivable authority for what he said might come from Lord Porter's famous speech in *Bourhill*.³⁶⁵ However, his references to the expectations of the 'ordinary frequenter of the streets' and 'the incidents that may from time to time occur in them', were expressed in relation only to 'the driver of a car who causes the noise of a collision and the sight of injury to others', and not in relation to a great catastrophe such as the explosion of the Piper Alpha oil rig. On the contrary, their Lordships in *Alcock* were having in mind

³⁶¹ [1994] 2 All ER 1 at 14.

³⁶² Oughton and Lowry, above n 338, 21. Murphy, however, suggests that even if it is highly improbable that such people would be, at the same time, both *mere bystanders* and those in 'a close relationship of love and affection' with the victim(s), on occasion, there may be no choice since the plaintiff may enjoy a relationship of love and affection with the victim but be completely unable to assist, which was precisely the scenario in *Alcock*. John Murphy, 'Negligently inflicted psychiatric harm: a re-appraisal.' (1995) 15 *Legal Studies*, 415, 417.

³⁶³ 'Persons other than relatives or persons hurt may genuinely suffer nervous shock...on witnessing another's suffering or danger in an unexpected accident. That is a foreseeable possibility, and not a fantastic or negligible one.' *Mount Isa Mines Ltd. v. Pusey*. (1971) 125 CLR 383 per Windeyer J at 404. In *Hambrook v. Stokes Brothers*. [1925] 1 KB 141 Atkin LJ clearly accepted the possibility of a successful action by a mere bystander (at 158-59) In *Alcock*, Lord Oliver had said that there was nothing in *Bourhill* to indicate that the case was dismissed *in limine* on the ground that she was no more than a mere spectator. [1992] 1 AC 310, at 412-13; and Lord Ackner said that, while it may be rare for a mere spectator to suffer shock-induced injury as a result of witnessing a horrific accident, there is no reason in principle why a reasonably strong nerved person would not suffer some medically recognisable psychiatric illness. *Alcock v Chief Constable of South Yorkshire* [1992] 1 AC 310 at 403.

³⁶⁴ Oughton and Lowry, above n 338. Wheat, above n 7, 322. note 41. McFarlane seems to have been a persistent man; he subsequently sued his own counsel for failing to plead a claim in breach of statutory duty...Peter Handford, 'Psychiatric injury in the workplace.' (1999) *Tort Law Review* 141.

³⁶⁵ '...the ordinary frequenter of the streets has sufficient fortitude to endure such incidents as may from time to time occur in them...and (the defendant) is not to be considered negligent towards one who does not possess the customary phlegm.' [1943] AC 92 at 117.

precisely an event significantly different in degree and severity to suggest the occasion in which a mere bystander may successfully bring an action.³⁶⁶

It has been suggested that a possible implication of that decision is that no event can ever be horrific enough for a mere bystander to recover for psychiatric illness.³⁶⁷ Handford believes that the retreat in *McFarlane* from the possibility contemplated in *Alcock* was a retrograde step. There is no doubt, he says, that the Piper Alpha disaster reached the scale of horror contemplated by the House of Lord's example of a petrol tanker careering out of control into a school full of children and bursting into flames.³⁶⁸

A significant difference, however, should be made between the bystander, defined as the 'unwilling witness of injury caused to others', and 'the goulishly curious spectator',³⁶⁹ who forms part of the crowd which inevitably gathers out of curiosity in the event of an accident, and which seems to increase in proportion with its gravity. According to Brennan J., in *Jaensch v. Coffey*,³⁷⁰ such a bystander may properly be regarded as the author of his own shock. The first one is confronted with a tragic event because of his coincidentally proximate location at the time of the accident. The second one, approaches to the scene in order to look, and this constitutes a *novus actus interveniens* which breaks the chain of causation between the defendant's negligence and the psychiatric injury.³⁷¹ Accidental bystanders and morbid excitement seekers do not in any way contribute to the salvation of those in hardship, nor are they in any way related to the victim, therefore falling outside the ambit of the defendant's liability.³⁷²

1.15 Rescuers.

1.15.1 Generally.

The courts have traditionally taken a sympathetic view of claims by rescuers to be compensated for injuries sustained in the course of dealing with hazards created by the negligence of others. But, is it different if the rescuer is a professional, who is specially

³⁶⁶ Murphy, above n 131, 418.

³⁶⁷ Jones, above n 95, 117. Dunford and Pickford, above n 157, 376.

³⁶⁸ Peter Handford, above n 357, 141. Keng Feng Tang, 'Nervous shock: bystander witnessing a catastrophe.' (1995) 111 *Law Quarterly Review* 50. US jurisprudence has been able to distinguish the bystander situation in cases that are not appropriately so classified, and has done so not by a return to the zone of danger limitation but by invoking the concept of *direct relationship*. Handford, above n 228, 46. Tureau, above n 27, 1005.

³⁶⁹ *White v Chief Constable of South Yorkshire* [1999] 1 All ER1. per Lord Hoffmann.

³⁷⁰ (1984) 155 C.L.R. 549 at 572.

³⁷¹ Trindade, above n 127, 481.

³⁷² Janssens, above n 109, 92.

trained and paid to deal with particular types of danger, whether arising from negligence or not?³⁷³ And if the damage sustained is psychiatric rather than physical harm, does that constitute a substantially different circumstance?

*White v Chief Constable of South Yorkshire Police*³⁷⁴ was the third case to reach the House of Lords arising out of the Hillsborough disaster. This time five police officers sued their employer for post-traumatic stress disorder as a result of their experiences when tending to the victims of the disaster. The officers were on duty at the time and became involved in various ways in the immediate aftermath of the tragic events³⁷⁵: two helped carry the dead and injured at the stadium; two tried unsuccessfully to resuscitate injured spectators at the stadium; and one assisted at a mortuary to which the dead were taken. None of them had been in any physical danger at any time.

Their claim was based on two grounds- first, that they had a relationship with the Chief Constable analogous to that of employer and employee and second, that they were rescuers, and as such, were *primary victims* and therefore not subject to the *Alcock* control mechanisms.

At first instance, Waller J dismissed all the claims. He held that no employer-employee duty arose to protect a *secondary victim* police officer from mental injury unless he could be categorised as a rescuer. The learned judge held that, among the five officers, only White could be considered as a rescuer, but he was a professional rescuer and strong policy considerations dictated that he should not be able to recover when a bystander could not. He could not be put in a more advantageous position than a bystander. Traumatized professional rescuers not placed in personal peril by the accident were not to be assisted by the common law. Relief was restricted to civilian rescuers and professionals physically endangered. His general conclusion was that it was 'unattractive' and not 'just and reasonable' that any of the officers or members of the emergency services should recover when a bystander could not; in

³⁷³ Michael Jones, 'Compensating Professional rescuers'. (1988) 104 *Law Quarterly Review* 195, 196.

³⁷⁴ [1999] 2 AC 455. Rogers explains the rather confusing situation that the case, at the Court of Appeal level and before Waller J, is known as *Frost v. Chief Constable of South Yorkshire*, though no Frost was a plaintiff at any hearing. So Frost was presumably a plaintiff in one of a number of other claims which were not selected for trial as test cases. W.V. H. Rogers, 'Psychiatric trauma: 'Thus far and no further'- in fact not quite so far as hitherto.' (1999) 7 *Torts Law Journal*, 1, 1.

³⁷⁵ One of the most intimately involved was an Inspector White, who had been present at the ground at the time of the incident and who assisted near the affected pens, rendering emergency treatment to victims and dealing with crowd control. Dunford and Pickford, above n 157, 367.

other words, it was an application of the American rule that public servants are paid to do the job and suffer the dangers of that job.³⁷⁶

Jones suggests that this is probably gut-reaction common sense, but ultimately it is a matter of policy³⁷⁷, since ‘probably most fires are attributable to negligence, and in the final analysis the policy decision is that it would be too burdensome to charge all who carelessly cause or fail to prevent fires with the injuries suffered by the expert retained by public funds to deal with those inevitable, although negligently created occurrences.’³⁷⁸

The Court of Appeal, in a two to one majority decision, dismissed the appeal of the officer who had been at the mortuary, but allowed the appeals of the four officers at the stadium on the grounds that they had a right of action because their injury was caused by the antecedent negligence of the chief constable and they fell within the special category of rescuers (not subject to Lord Wilberforce’s restrictions). The chief constable appealed.

In the House of Lords, the case involved a re-examination of the primary/secondary classification of *Page v. Smith*³⁷⁹ as well as the consideration of whether, or how, it should apply in the context of claims of employees against their employers for negligently exposing them to the risk of psychiatric harm and claims by rescuers who suffer such harm as a result of the horror of the event.³⁸⁰

Civilian rescuers who suffer psychiatric injury were generally governed by *Chadwick v British Transport Commission*.³⁸¹ In 1967, a train crashed 200 meters away from the home of Mr. and Mrs. Chadwick. Ninety people died and many more had serious injuries. Mr. Chadwick immediately went to the scene and voluntarily took an active part throughout the night in rescue operations. Because he was quite small, he was asked to crawl into the train wreckage to administer injections to injured passengers and to aid persons trapped in the mangled cars. Afterward he fell into a deep depression, spent six months in a psychiatric hospital, and eventually committed suicide. His widow’s fatal accident action was successful. The theory of liability was that Mr. Chadwick was a rescuer, and the ambit of liability for

³⁷⁶ Simon Allen, ‘Rescuers and employees – primary victims of nervous shock.’ (1997) *New Law Journal* 158, 158.

³⁷⁷ Jones, above n 366, 196.

³⁷⁸ *Kraut v. Geller*. (1960) 157 A. 2d 129, at 130-131 *per* Weintraub.

³⁷⁹ (1996) AC 155. Mendelson argues that Lord Lloyd, in *Page*, referred to secondary victims as ‘bystanders’, as did Lord Griffiths and Hoffmann in *White*. By using both terms as interchangeable, she says, the House of Lords blurred the distinction between these two categories of claimants, which brings serious consequences, because although common law courts exclude bystanders from recovery altogether, they allow recovery for pure psychiatric injury to some secondary victims. Danuta Mendelson, ‘Quo lūre? Liability to rescuers in the tort of negligence.’ (2001) *Tort Law Review* 146.

³⁸⁰ Stephen Todd, ‘Psychiatric injury and rescuers.’ (1999) 115 *Law Quarterly Review* 345, 350.

³⁸¹ [1967] 2 All ER 945.

rescuers who suffered psychiatric injury was broader than that for other victims. The Court held that in the event of a serious accident, it was reasonably foreseeable that someone might endeavour to rescue the victims and suffer psychiatric injury in the process.³⁸² Injury by shock to a rescuer, physically unhurt, was reasonably foreseeable, and the fact that the risk run by a rescuer was not exactly the same as that run by the victim did not deprive the rescuer of his remedy.³⁸³

Chadwick represented a serious obstacle for the majority in *White* because they were denying liability to the police officers who were rescuers at Hillsborough. The hurdle was not trivial since the law had long recognised the moral imperative of encouraging citizens to rescue persons in peril. Those who altruistically exposed themselves to danger in an emergency to save others were favoured by the law and this was unanimously accepted.

In spite of that, the majority in the House decided to reinterpret the *Chadwick* case, stating that rescuers should not be given special treatment when they had not objectively exposed themselves to danger or reasonably believed that they were doing so.³⁸⁴ Their Lordships indicated that the whole issue was just a matter of categories: rescuers were secondary victims and, accordingly, the ordinary *Alcock* restrictions should apply: proof of ties of love and affection between plaintiff and accident victim; proximity in time and space; and direct perception of the disaster or its immediate aftermath. It is not difficult to see that, according to these requirements, most, if not all rescuers, will inevitably fail on the first point.

The decision was not only a result of their conviction that a recognition of their claims would substantially expand the existing categories in which compensation could be recovered for pure psychiatric harm but, mainly, that the awarding of damages to them would stand uneasily with the denial of the claims to bereaved relatives by the decision in the *Alcock* case. It has been said that, lurking beneath the surface of the judgments was an uneasiness that, if it were acceptable to compensate the police officers as a result of their involvement at Hillsborough, the spectators whose claims were denied by the House of Lords in *Alcock* would have had a rough deal.³⁸⁵

³⁸² [1967] 1 WLR 912, at 920.

³⁸³ At 921.

³⁸⁴ Mendelson, above n 372, 152. The much narrower approach of the majority in *White* than that adopted in previous lower court cases is also pointed out by another prestigious commentator. Handford, above n 222, 602.

³⁸⁵ Peter Handford 'Hillsborough replayed.' (1997) 113 *Law Quarterly Review* 410, 417. Michael Jones, 'Liability for psychiatric damage: searching for a path between pragmatism and principle' in Jason Neyer et alii (eds) *Emerging Issues in Tort Law*. (2007) 119.

That uncomfortable feeling clearly emerges through Lord Steyn's view that to admit this group would lead to the 'unedifying spectacle that, while bereaved relatives are not allowed to recover as in *Alcock*, ghoulishly curious spectators, who assisted in some peripheral way in the aftermath of a disaster, might recover.'³⁸⁶

Lord Hoffmann also thought that the more important reason for not extending the law to 'rescuers' who were not within the range of foreseeable physical injury was that

'the result would be quite unacceptable to the ordinary person because...he would think it unfair between one class of claimants and another, at best not treating like cases alike and, at worst, favouring the less deserving against the more deserving. He would think it wrong that policemen, even as part of a general class of persons who rendered assistance, should have the right to compensation for psychiatric injury out of public funds while the bereaved relatives are sent away with nothing.'³⁸⁷

Rogers argues that the decision marks a departure from what has been a tenable view of the law. He remarks that for over 60 years it has been accepted in England that where A puts B in danger, C a person who comes to the rescue of B, may be owed a duty of care by A and, unless the intervention is wholly foolhardy, cannot be met by pleas of *volenti non fit injuria*, a break in the chain of causation, or contributory negligence.³⁸⁸

It is easy to agree with Lomax and Treece who argue that *White* is more a condemnation of the decision in *Alcock* than a bad decision in its own right.³⁸⁹ In any event, it is clear that in *White* the firm tendency that the courts had to respond positively to negligence claims advanced by those who have rendered assistance to accident victims came into collision with the judicial impulse to limit the range of circumstances in which recovery could be made for psychiatric injury.

Another aspect that has been pointed out is the fact that, in 1982, the Law Lords in *McLoughlin* were convinced that there would be few claims for mental injury and that they would be for modest amounts. By the time of *White*, however, Lord Steyn had concluded that this assumption had been falsified by the growth of claims for psychiatric damage in the last 10 years. He cited Professor Mullany³⁹⁰ when he said that there was a growing appreciation that the scope for psychiatric suits was much wider than traditionally perceived. That conclusion was reinforced by the Law Commission's Report and the number of claims

³⁸⁶ [1999] 1 All ER 1 at 38.

³⁸⁷ [1999] 1 All ER 1 at 48. Lord Steyn also was concerned that the decision of the Court of Appeal had 'introduced an imbalance in the law of tort which might perplex the man on the underground.' Ibid, at 34.

³⁸⁸ Rogers, above n 367, 4.

³⁸⁹ Lesley Lomax and Stephen Treece, 'Rescuers at risk?' (1999) *Tort Law Review* 212.

³⁹⁰ Nicholas Mullany, 'Fear for the future: liability for the infliction of psychiatric disorder' in Mullany (Ed.) *Torts in the nineties*. (1997)

arising from the Hillsborough disaster. In short, there was a sense that ‘if you allow it they will come.’³⁹¹

1.15.2 Who is a rescuer?

When grasping the issue in *White*, intuitively, the first question should be: who, in law, is a rescuer? And surprisingly, the definition of who is a rescuer in the eyes of the law is not entirely clear, even though rescuers’ cases have had a relatively long history.³⁹²

Before *White*, there was no attempt of definitions.³⁹³ In the Court of Appeal, Rose LJ pointed out that the determination whether a particular plaintiff was a rescuer or not was a question of fact to be decided in the light of the circumstances of the case. He noted that some relevant criteria were: (a) the character and extent of the initial incident caused by a tortfeasor; (b) whether that incident has finished or is continuing; (c) whether there is any danger continuing or otherwise to the victim or to the plaintiff; (d) the character of the plaintiff’s conduct, in itself and in relation to the victim; (e) *how* proximate in time and space the plaintiff’s conduct is to the incident.³⁹⁴ Mullany and Handford criticize this last consideration. The aftermath principle, they say, has not produced happy results when applied to actions by relatives and resort to it in this context seems unfortunate.³⁹⁵

It is generally accepted that a situation of danger or emergency is required to determine whether the conduct of the rescuer was reasonable in the circumstances. The courts have not expressed any opinion on the magnitude or gravity of the accident required to be considered sufficient to cause legally recognised psychiatric illness.³⁹⁶ Injuries resulting from exposure to unnecessary risk cannot give rise to a claim.³⁹⁷ The courts have justified this conclusion by saying that if the effort was foolhardy, rash, or needlessly reckless, therefore, the rescue attempt was not foreseeable and no duty was owed.³⁹⁸ It is not necessary to prove the

³⁹¹ K. Mackenzie, ‘Oh, what a tangled web we weave’ in Baulac, Pitel & J Schulz (eds) *The joy of torts*. (2003) 133.

³⁹² Luh and Sy, above n 103, 133.

³⁹³ Previous reported cases had involved sole plaintiffs, with little doubt about their status, and as they were decided before *Page v. Smith*, no question of categorisation as primary or secondary victim arose. Dunford and Pickford, above n 157, 372.

³⁹⁴ At 1203. Allen, above n 369, 159.

³⁹⁵ Mullany and Handford, above n 81, 414.

³⁹⁶ Luh and Sy, above n 103, 136.

³⁹⁷ ‘The law has so high a regard for human life that it will not impute negligence to an effort to preserve it, unless made under circumstances constituting rashness in the judgment of prudent persons.’ *Eckert v. Long Island Railroad Co.* (1871) 43 NY 502 at 505.

³⁹⁸ Allen Linden, ‘Rescuers and good samaritans.’ (1971) 34 *Modern Law Review* 241, 257.

existence of actual danger.³⁹⁹ It is sufficient if the rescuer reasonably believes that someone is in danger or in a state of emergency that requires immediate attention.

An involvement in the rescue process is also required. Again, the degree of involvement to be classified as a *rescuer* will have to be determined on a case by case basis. This was one of the factors which Stuart-Smith L.J. considered to be material in *McFarlane* when he held that helping to move blankets for the expected casualties, and possibly assisting two walking injured as they arrived on the Tharos in a dazed state was not enough.

A Canadian case, *Bechard v. Haliburton Estate*,⁴⁰⁰ shows the flexibility of the *involvement* concept. There, the plaintiff was the occupant of a vehicle struck by a motorcycle that had run a stop sign. The injured cyclist was left lying in the road, where he was run over and killed by another vehicle. The plaintiff saw the second vehicle approaching and unsuccessfully attempted to warn the driver by screaming and waving arms. She suffered amnesia at the scene and a later post-traumatic neurosis. The plaintiff's action was successful against both the cyclist's estate and the negligent second motorist. Justice Griffiths, delivering the judgment of the Ontario Court of Appeal, categorized the plaintiff as a rescuer.⁴⁰¹ The fact that the plaintiff's actions were not tending to the injured victim lying in the road, but attempting to direct traffic away from him to ensure that he suffered no further injury before help arrived, did not prevent the court from considering that he was performing a function analogous to a rescuer.

The rescue attempt does not need to be successful. This is understandable because it is often difficult to know in advance if a rescue effort will yield positive results, as where children are lost in the wood, or miners are buried in a mine. If there is a reasonable chance of saving life or avoiding injury, the common law cannot deny recovery to those hurt during these attempts for fear that they may be discouraged from their heroic acts.⁴⁰²

In *Chester v Council of the Municipality of Waverley*⁴⁰³, Evatt J. said that the rescuer 'is not debarred from recovery because in the light of after knowledge it is plain that his attempt at rescue could never have aided the victim of the defendant's primary negligence'⁴⁰⁴; and

³⁹⁹ Ibid, 256.

⁴⁰⁰ (1991) 5 O.R. (3d) 512 (C.A.)

⁴⁰¹ At 522-525. In earlier cases, there were judges prepared to extend the rescuer concept to others who were not technically rescuers, such as 'searchers'.

⁴⁰² Linden, above n 391, 257.

⁴⁰³ (1939) 62 CLR 1.

⁴⁰⁴ (1939) 62 C.L.R. at 38.

one of the police officers at Hillsborough, who unsuccessfully tried to resuscitate spectators who were already dead was, nonetheless, categorised as a rescuer.⁴⁰⁵

This conception, of course, is completely different from Rose L.J.'s narrow definition of a rescuer in *Duncan v British Coal Corp.*⁴⁰⁶ The plaintiff worked at a mine as a pit deputy when a fellow worker was crushed to death. He attended the accident and attempted to revive his colleague but was unsuccessful. Rose L.J. found that the police officer was not a rescuer because 'he was not sufficiently involved in the crushing incident or its immediate aftermath' (because he had arrived at the scene four minutes after the accident took place!)

And he added,

What he did was proximate in time to the trapping of the deceased, but he was not geographically proximate when that incident occurred. When he arrived at the scene, there was no danger to him or the deceased...he was outside the area of risk of physical or psychiatric injury when the deceased was injured and he was not exposed to any unnecessary risk of injury when he attended the scene.⁴⁰⁷

In *White v. Chief Constable of South Yorkshire*⁴⁰⁸, Lord Steyn, trying to define the category and reinterpreting *Chadwick*, said that in order to limit the concept of rescuer to reasonable bounds 'the plaintiff must at least satisfy the threshold requirement that he objectively exposed himself to danger or reasonably believed that he was doing so.' He believed that the limitation of actual or apprehended dangers was what proximity in that special situation required and that it would be an unwarranted extension of the law to uphold the claims of the police officers.

Lord Hoffmann also emphasised that a rescuer must have put himself within the area of physical danger before he can recover damages for psychiatric injury. He said that there was not any logical reason why the normal treatment of rescuers on the issues of foreseeability and causation should lead to the conclusion that, for the purpose of liability for psychiatric injury, they should be given special treatment as primary victims when they were not within the range of foreseeable physical injury and their psychiatric injury was caused by witnessing or participating in the aftermath of accidents which caused death or injury to others.

This emphasis on the zone of physical danger led Handford to say that the House of Lords in *White* put the clock back more than fifty years. Liability for psychiatric injury should not be restricted by reference to the possibility of physical danger and such an

⁴⁰⁵ It has been suggested that while the results in *Frost* seem right, the decision in the companion appeal in *Duncan v British Railways Board* is very odd. Mullany and Handford, above n 81, 414.

⁴⁰⁶ [1997] 1 All ER 540.

⁴⁰⁷ At 554.

⁴⁰⁸ [1999] 1 All ER 1

approach is open to the same criticisms in its restrictive guise as it was when used to expand liability.⁴⁰⁹

Until *White*, it was clear that what characterized a rescuer was his involvement in rendering assistance to somebody who *was* in danger (or when he reasonably believed he was). The one who needed to be in danger was the one who needed help, not the rescuer. It did not matter if Mr. Chadwick was in fact in some physical danger at various points during the night. What mattered was that the victims were. According to the traditional view, if someone is drowning and from the deck or a boat in the most comfortable position I throw a rope, I still am a rescuer, regardless the fact that I have not, at any moment, put my life or body integrity at risk. The favour of the law is extended to somebody who is unselfish enough to act when he could refrain from doing so. The civil law would punish bystanders for failure to act in those circumstances. The common law does not go that far, but gives him the whole recognition of the law for that altruistic action, even if it does not imply any risk.

If the person can manage, by his own efforts to go ashore and I cure his wounds, give him some water, give him a blanket or whatever other assistance that the circumstances required, no matter how active I may be, or how helpful those measures are to make the victim feel more comfortable, I am still not a rescuer, because the danger is not existing anymore. For the lack of a better word, I could say that I am a *helper* or *aid giver*. This seems to be the core of Lord Griffiths's distinction between 'rescue in the sense of immediate help at the scene of the disaster, and treatment of the victims after they are safe.'⁴¹⁰ What is pivotal in the concept is the function: somebody who is trying to take another out of danger. And public policy requires a wide definition of that function. Mr. Chadwick did not fall out of the category because he did not attempt to get the victims out of the wreckage. On the broad view, his function was to keep them alive in order to gain time until another rescuer, better equipped, could successfully (or not) do that.

The determination of the existence of the danger should be *subjective-objective*; that is, what the rescuer *reasonably* believes. If the person is already dead, but I believe that my resuscitating efforts might still work, I still am within the boundaries of the rescue category.⁴¹¹ On the other hand, if he has been dead for a week, no matter how strong my beliefs are, or how powerful my faith is that supernatural force is going to backup my efforts,

⁴⁰⁹ Handford, above n 81, 498. Donal Nolan, 'Taking stock of nervous shock' (1999) 10 *King's College Law Journal* 112, 118.

⁴¹⁰ (1999) 1 All ER 1 at 7. As for rescue actions of victims after they were safe, Lord Griffiths felt that in such cases, where the rescuer is in no physical danger, it will only be in very exceptional situations that psychiatric injuries are foreseeable. Again, is not because the rescuer is out of danger, but because the rescuee is now safe!

⁴¹¹ Linden, above n 391, 256. *Wagner v. International Rayway*, 232, N.Y., 176, 133 N.E., 437 (1921).

the unreasonableness of the action puts me out of the category. The danger objectively does not exist and could not be reasonably taken as existing.

However, in *White* the majority reinterpreted *Chadwick* as standing for the requirement that rescuers who suffer psychiatric injury in the course of a rescue must prove that they were in physical danger. In doing so, the difficulty seems to have shifted from *who is a rescuer?* to *what was the zone of danger?*⁴¹²

The artificiality and arbitrariness of this control device was pointed out by Lord Goff in his powerful dissent. Suppose, he says, that there was a terrible train crash and that there were two Chadwick brothers living nearby, both of them small and agile window cleaners distinguished by their courage and humanity. Mr A Chadwick worked on the front half of the train, and Mr B Chadwick on the rear half. It so happened that, although there was some physical danger present in the front half of the train, there was none in the rear. Both worked for 12 hours or so bringing aid and comfort to the victims. Both suffered PTSD in consequence of the general horror of the situation. On the new control mechanism now proposed, Mr A would recover but Mr B would not. To make things worse, the same conclusion must follow even if Mr A was unaware of the existence of the physical danger present in his half of the train.⁴¹³

It is certainly not difficult to agree with those who believe that there is a degree of artificiality in trying to force all possible situations into two categories⁴¹⁴, or who consider that the primary/secondary distinction represents a straitjacket into which all actions for emotional distress must be forced, no matter how unsuitable.⁴¹⁵

Another aspect that has not been sufficiently explored by the commentators is the fact that the zone of danger, or physical danger requirement, to be coherent, has to have an *active role* in the causation of the mental distress. For instance, in *McFarlane*, Stuart-Smith LJ stated that plaintiffs may recover for psychiatric injury sustained through fear of physical injury if they were in the actual zone of physical danger, or even if they were not, because they reasonably thought that they were. On the facts of the case, he ruled that the plaintiff did not satisfy either of these objective tests. However, Hilson acutely points out that the plaintiff's case really seems to have failed, more than anything, because the evidence did not sufficiently support the fact that he was *subjectively* in fear of his own safety. In a logical

⁴¹² Rogers, above n 367, 5.

⁴¹³ (1999) 1 All ER 1 at 27.

⁴¹⁴ Peter Handford, 'A new chapter in the foresight saga: psychiatric damage in the House of Lords.' (1996) *Tort Law Review* 1, 8.

⁴¹⁵ Todd, above n 24, 195.

order, this should have been the first question. If the answer was negative, there would have been no need to proceed to examine either of the two objective tests. What his Lordship actually did was to ask the two objective tests first and the question of whether McFarlane in fact feared for his life was not really formulated as a crucial *test* in the same way.⁴¹⁶

The danger with addressing the objective element as two tests, but not including the subjective element as a test, the author submits, is that subsequent courts might be tempted to address simply the objective element. If, for example, a court decides that someone was in the zone of danger, then it might automatically conclude that he was in fear for his own safety.⁴¹⁷ In other words, a person who, in spite of being in the zone of danger does not fear for himself, might still be categorised as primary victim, simply because of where he is located and not on the basis of what gave rise to the shock.

That is why Hilson submits that instead of following Lord Lloyd's approach and concluding that someone is automatically a primary victim if he is within the zone of danger, the courts should adopt Lord Oliver's 'fear for one own's safety' approach and look at the evidence of how the psychiatric injury arose. If it arose solely out of fear for the plaintiff's own safety, then there ought to be recovery as a primary victim.⁴¹⁸ The author suggests that the test should be subjective (that is, the plaintiff would have to provide evidence that he was in actual fear for his own safety) and then objective in that the courts should proceed to ask whether it was reasonable to hold such fear. This is unfair to a victim that has already been penalised by the facts. The test should be objective, creating a presumption on favour of the plaintiff who was in the zone of danger at the time of the accident, that that fear existed. It should be the defendant's duty to destroy that presumption (which, in fact, will be extremely difficult).

In any event, it seems possible to reduce everything to just one question: was the plaintiff in reasonable fear for his own life? This will cover the necessary subjectivity to justify the assumption that the fear played an active role in the injury, and also would satisfy the objective element by requiring reasonableness in the fear that was felt.

Professor Todd believes that perhaps problems can be solved without major difficulties simply by asking whether the plaintiff reasonably believed that he or she was in danger.⁴¹⁹ This is apparently the same thing that we are proposing, but is not. If the cause that triggers the psychiatric harm is the fear, what the court must determine is if the plaintiff was in fear,

⁴¹⁶ Hilson, above n 97, 46.

⁴¹⁷ Ibid, 47.

⁴¹⁸ Ibid, 48.

⁴¹⁹ Todd, above n 24, 185.

not if he believed he was in danger and, if that is the case, if that fear was reasonable. The question about the existence of the danger leaves us half way, because even if that danger actually exists, the plaintiff, because of a particular phlegm, may still not feel fear. In that case, he could not claim having suffered psychiatric harm based on a fear that did not exist.

To add some complexity to the situation, we can imagine that the moment of the fear and the moment of the rescue action might not be necessarily coincidental. Let us imagine that, because of the release of adrenaline, because he is only thinking about the victim, or for whatever other reason, the rescuer does not fear for his life at the moment of the action. However, as soon as he puts the victim safely on the floor, he looks back, sees the size of the flames, or the height of the building where he has jumped from, or the strength of the current of the river where he courageously swam with the victim in his arms, and panics. Should this rescuer be out of the contemplation of the law because he did not fear for his life at the moment of the rescue? Of course, this is mere theorisation, because in an objective dangerous circumstance, to prove that the plaintiff did not actually fear for his safety should be extremely hard.

1.15.3 The fireman's rule.

It has been submitted that the degree of danger to be considered sufficient to cause legally recognised psychiatric illness should be determined on an objective basis and not according to the type of rescuer.⁴²⁰ In *Ogwo v Taylor*⁴²¹ the House of Lords allowed the claim of a fireman against a non-employer defendant for personal injury and confirmed that where physical injury is suffered by a professional rescuer the defendant cannot successfully argue that the risk is inherent in the plaintiff's employment in order to avoid liability. Lord Bridge, delivering the only speech in the House, considered that there was no reason whatever why they should be held at a disadvantage as compared to the layman entitled to invoke the principle of the so-called 'rescue cases'.

Lord Hoffmann, in *White v Chief Constable of the South Yorkshire Police*⁴²², following *Ogwo v. Taylor*⁴²³ rejected the fireman's rule, saying that he did not believe 'that someone should be unable to recover for injury caused by negligence, in circumstances in which he would normally be entitled to sue, merely because his occupation required him to run the risk

⁴²⁰ Luh and Sy, above n 103, 135.

⁴²¹ [1988] AC 431.

⁴²² [1999] 1 All ER 1

⁴²³ [1988] AC 431.

of such injury.’ However, he thought it was legitimate to take into account the fact that, in the nature of things, most professional rescuers would be from occupations in which they are trained and required to run such risks and which provide for appropriate benefits if they should suffer such injuries.

Lord Goff also referring to the position of people such as policemen or firemen, who might be thought to be less prone to suffer psychiatric injury at the sight of the sufferings of others than members of the general public, said that in *Ogwo v Taylor* it was held that the American fireman’s rule⁴²⁴ had no place in English law. Therefore, unlike Waller J, he would not think it necessary to identify a class of ‘professional’ rescuers to which special rules apply.

Professor Todd, based on the fact that *Ogwo* was not a case of psychiatric injury, believes that there are grounds for making a distinction between professional rescuers who claim in relation to physical injuries and those who do it in respect of psychiatric injuries. Foreseeability, in this last case would be doubtful. Police officers, firemen, and other professional rescuers, that is, people in constant contact with everyday tragedies and human suffering should be regarded as persons with extraordinary phlegm,⁴²⁵ hardened to events that would cause emotional distress to ordinary people.⁴²⁶ The ‘ordinary fortitude’ requirement in those cases would be higher (for that particular class), but recovery would probably still be possible for catastrophes able to shock even those of *extraordinary phlegm* (9/11 would probably be one of those cases).

Causation arguments would also appear to have some force here. The fact that professional rescuers will to some extent have become hardened to witnessing horrific events may make it more difficult to prove causation, and the fact that they are likely to have witnessed several such events may make it more difficult to attribute psychiatric illness to a specific event.

1.16 Employees.

⁴²⁴ Under the justification that the purpose of the firefighting profession is to confront danger, in the United States, a number of jurisdictions have adopted this rule. It establishes that a professional firefighter may not recover damages from a private party for injuries he sustained during the course of extinguishing a fire. He can apply for benefits under the relevant’s workers’ compensation statutes, but he cannot sue for damages at common law. Danuta Mendelson, ‘Quo Iure? Liability to rescuers in the tort of negligence.’ (2001) *Tort Law Review*, 138.

⁴²⁵ Hilson believes that because there is unlikely to be floodgates problem with either rescuers or employees, it may be sensible to exclude them from the need to satisfy the requirement of *ordinary phlegm*. Hilson, above n 96, 55.

⁴²⁶ Todd, above n 314, 350.

Handford submits that, since most of the accidents that end up in the courts occur either in a transport context or at work, it seems logical enough that employees should be, next to relatives of the dead and injured, the largest potential category of psychiatric injury sufferers.⁴²⁷

In *Frost*, it was argued, as an alternative to the rescue claim, that the relationship of employer and employee was a long-standing basis for a duty of care with respects to matters of safety and, therefore, the defendant owed the plaintiffs a duty of care arising from their service as police officers when acting under his direction and control. The plaintiff relied on four cases: *Dooley v Cammell Laird & Co. Ltd.*⁴²⁸; *Galt v British Railways Board*⁴²⁹; *Wigg v British Railways Board*⁴³⁰ and *Mount Isa Mines Ltd. v Pusey*⁴³¹

In *Dooley v. Cammell Laird & Co. Ltd.*⁴³² a crane driver successfully sued his employers for damages for psychiatric injury after a load fell off a crane he was driving crashing down into the hold of a ship. A defective rope which snapped, releasing a sling, and for which the defendants were responsible, was the cause of the accident, and the plaintiff had every reason to believe that the falling load had flattened his workmates.

Galt concerned a reasonably foreseeable injury by shock in the form of a heart-attack sustained by a train driver who, coming around a bend at speed, saw two railway workers on the track ahead of him. Neither worker was injured, but the plaintiff was awarded damages as against his employers for his condition, which was the result of their negligence in allowing the situation to arise.

In *Wigg*, a train driver successfully sued his employers for damages for psychiatric injury sustained as a result of witnessing the distressing sight of a passenger who had been killed while attempting to board after the guard negligently gave the starting signal.

In *Mount Isa*, two employees who were testing a switchboard were severely burned by an intense electric arc caused by their negligence. The defendant had not properly instructed them in their duties. The plaintiff ran to the scene and saw one of the electricians severely burned. The plaintiff aided him and assisted in carrying him to an ambulance. The electrician died about nine days later. For about four weeks the plaintiff continued working without any apparent impairment of his health, but thereafter he developed a serious mental disturbance.

⁴²⁷ Peter Handford, 'Psychiatric injury at the workplace' (1999) 7 *Tort Law Review*, 126, 128.

⁴²⁸ [1951] 1 Lloyd's Law Report 271

⁴²⁹ [1983] 133 N.L.J.870

⁴³⁰ The Times, 4/2/86

⁴³¹ [1970] 125 CLR 383.

⁴³² [1951] 1 Lloyd's Law Report 271.

In *Frost*, the majority in the Court of Appeal, accepting the argument that conventional employer's liability principles could apply, upheld the claims of two police officers. Rose and Henry LJ held that the plaintiffs were primary victims, since they had been directly involved in the course of their employment in the consequences flowing from their employer's negligence.

In the House of Lords, Lord Hoffmann said that out of the three English cases mentioned, only *Dooley* had been reported in full. On the contrary, the reasoning in *Galt* had been condensed to a single sentence and that of *Wiggs* was also abbreviated. He held that they all were pre-*Alcock* decisions and in accordance with the law as it was thought to be at the time. There was no reference to the control mechanisms, which had not yet been invented. His Lordship maintained that that was a view which might well have prevailed, but the subsequent retreat from principle in *Alcock* meant that all of them had either to be given up as wrongly decided or explained on other grounds. In relation to *Mount Isa*, he said that only one of the judges found it necessary to discuss the principles of liability for psychiatric injury and he expressly refrained from considering whether it could be based upon the employee relationship. He also referred to Lord Oliver's attempted rationalisation of the three English cases by saying that in each, the plaintiff had been put in a position in which he was, or thought he was about to be or had been, the immediate instrument of death or injury to another. He mentioned *Robertson v Forth Road Bridge Joint Board*⁴³³ as well, declaring his agreement with Lord Hope who had adopted Lord Oliver's explanation of the English cases and rejected a claim for psychiatric injury by employees who had witnessed the death of a fellow employee in the course of being engaged on the same work. Lord Hoffmann regarded that as a rejection of the employment relationship being in itself a sufficient basis for liability. He finally referred to *Walker v Northumberland County Council*⁴³⁴ where an employee recovered damages for a mental breakdown held to have been foreseeably caused by the stress and pressure of his work as a social services officer. However, his Lordship said that the employee in *Walker* was in no sense a secondary victim. His mental breakdown was caused by the strain of doing the work which his employer had required him to do.⁴³⁵

Lord Steyn said that 'it is a *non sequitur* to say that because an employer is under a duty to an employee not to cause him physical injury, the employer should as a necessary

⁴³³ [1995] S.C. 364.

⁴³⁴ [1995] 1 All ER 737

⁴³⁵ At 506.

consequence of that duty (of which there is no breach) be under a duty not to cause the employee psychiatric injury.’⁴³⁶

Lord Griffiths said that the law of master and servant was not a discrete and separate branch of the law of tort, but was to be considered in relation to actions in tort generally. He agreed that the employer argument should be rejected, because if the approach suggested by counsel was right it meant that the police would be entitled to recover damages whereas spectators and others on duty in the ground who were exposed to the same horror and risk of psychiatric injury would not. He maintained that, on the contrary, one would expect the police to be at a disadvantage because they are trained to deal with catastrophic incidents and reasonably well compensated under the terms of their service if they do suffer injury in the course of their duties.⁴³⁷

Lord Goff (in dissent) made a distinction that he thought would avoid what otherwise might be regarded as an unacceptable distinction between employees on the one hand, and relatives on the other. The distinction was between cases in which the employee has in the course of his employment been involved in the event which resulted in the other's physical injury or death (or its aftermath), and cases in which he has incidentally witnessed that event and its outcome. He said that the police who became involved in the aftermath of the disaster could claim as employees and were distinct from other interveners who could claim only if they qualified as rescuers.⁴³⁸

1.17 Occupational stress.

A new form of liability, although not based on ‘shock’ induced injury and already described as the next growth area in psychiatric illness,⁴³⁹ relates to claims involving stress resulting from the pressure of work. A peculiarity of this type of harm is that the primary/secondary classification seems unable to cater meaningfully for occupational stress claimants, since they are not necessarily exposed to foreseeable danger.

⁴³⁶ At 497.

⁴³⁷ At 464.

⁴³⁸ At 483.

⁴³⁹ Mullany, above n 81, 107. A different opinion suggests that the variability inherent within the contractual and occupational context means that clear lines of liability are difficult to predict and, therefore, it is unlikely that litigation following *Walker* will be able to take up the impetus generated by the case or act as a deterrent to overburdening employers. Alan Sprince, ‘Recovering damages for occupational stress: *Walker v Northumberland County Council*.’ (1995) 17 *Liverpool Law Review* 189, 189.

*Walker v Northumberland County Council*⁴⁴⁰ was the first case in which an employee was awarded damages for psychiatric injury suffered as result of work related stress.

Mr. Walker managed four teams of social workers who were responsible for child abuse cases in the area of Northumberland. During the early 1980s the population increased and this resulted in a rise in the incidence of child abuse cases. As the work pressure increased, he suffered a severe 'nervous breakdown'. He had no previous history of mental disorders. When he returned to work, four months later, it was agreed with his employers that he would receive assistance as long as it was considered necessary. The support was not only soon withdrawn but he now also had to deal with the paperwork that had built up in his absence. Once again he started suffering from symptoms of stress and he received medical advice to take sick leave. He finally suffered a second mental breakdown which left him incapable of either returning to a similar job in social services or others which would involve considerable responsibility. He was dismissed by his employers on the grounds of permanent ill-health.

The Court of Appeal in *Petch v Customs and excise Commissioners*⁴⁴¹ had accepted that the duty to provide a safe system of work extended to the protection of an employee's mental health. Colman J applied the same principle, adding that there is no logical reason why risk of psychiatric damage should be excluded from the scope of an employer's duty of care. He held that the first breakdown was unforeseeable, but not the second one. He thought that the mental illness and the lasting impairment of his personality which Mr Walker sustained in consequence of the first breakdown was so substantial and damaging that the magnitude of the risk that he would have might sustain a mental breakdown of some sort should have been regarded as relatively large.

The decisions in *Walker* broke new ground in the sense that it clearly extended the law's protective reach beyond work-related physical harms and made actionable for the first time mental harm suffered by workers as a result of carelessness on the part of their employers.⁴⁴²

This approach was confirmed by the Court of Appeal in *Hatton v Sutherland*⁴⁴³ which is now considered the leading case on liability for work stress. In an extensive judgment, clearly intended to regulate work stress claims in England, Hale LJ said that, although there are no special control mechanisms applying to claims for psychiatric (or physical) injury or

⁴⁴⁰ [1995] IRLR 35 (QBD).

⁴⁴¹ (1992) ICR 789.

⁴⁴² Lesley Dolding and Richard Mullender, 'Law, Labour and mental Harm' (1996) 59 *Modern Law Review* 296, 298.

⁴⁴³ [2002] ICR 613.

illness arising from the stress of doing the work which the employee is required to do, those claims do require particular care in determination, because they give rise to some difficult issues of foreseeability and causation and in identifying a relevant breach of duty. She also said that the threshold question is whether this kind of harm to this particular employee was reasonable foreseeable and that foreseeability depends upon what the employer knows about the individual employee. Factors likely to be relevant are the nature and extent of the work done and whether there are signs from the employee of impending harm to health.

The House of Lords unanimously upheld those principles in *Barber v Somerset County Council*.⁴⁴⁴

⁴⁴⁴ [2004] ICR 457.

CHAPTER 2: THE CIVIL LAW

1. Damage.

Professor Markesinis submits that the common lawyer, unlike the civil lawyer, rarely asks himself the question, what damage is redressable in a tort law action? since his system, for some time at any rate, has not concentrated on *damnum* but on *injuria*. The reasons for that seem to be historical, since the award of damages used to be wholly within the province of the jury, which gave no reason for its findings. These findings were unquestionably within the jury's area of competence, if the defendant's behaviour was wrongful. Only where the damage was part of the wrong could the judges formulate rules in terms of *damage*. So the task of fixing the boundaries of liability had to be achieved through those concepts over which the judge had exclusive control, such as duty and remoteness.⁴⁴⁵

Despite the fact that all European codes require a plaintiff to have incurred loss for an action for damages to succeed, in general, none of them has attempted a detailed legal definition of the term '*damage*'. Art. 1382 of the French civil code, for instance, merely refers to the *dommage* and to the tortfeasor's obligation to compensate for it, without any other precision. This legislative vagueness has always been understood by the *Cour de Cassation* as reflecting the drafter's wish to allow compensation for all kinds of loss, irrespective of their nature –pecuniary/non-pecuniary- and of their origin –damages to property, personal injury or infringement of purely economic interests. From the beginning of the 19th century, it was therefore established that judges could not discriminate between pecuniary and non-pecuniary loss: both are compensable, provided they are certain, personal and legitimate.⁴⁴⁶

Despite the lack of legislative precision, there is a certain consensus that damage, in its broader sense is any loss, or unfavourable change that a person suffers in relation to his legally protected interests, whether they have financial implications or not. The mere infringement of a right does not necessarily represent damage.

One of the few existing legal definitions of the notion of damage is contained in § 1293 of the Austrian Civil Code: 'Damage is called every detriment which was inflicted on someone's property, rights or person.' It is under discussion whether damage is a legal or a

⁴⁴⁵ Basil Markesinis and Simon Deakin . *Tort Law* (2008) 722.

⁴⁴⁶ Suzanne Galand-Carval, 'Non- pecuniary loss under French law' in W.V. Horton Rogers (Ed) *Damages for non-pecuniary loss in a comparative perspective* (2001) 87.

natural term. Austrian scholars, in general, consider it a legal term as defined by the civil code.

Most civil law countries do not have a list of reparable harms. Rather than draw up a list or inventory of the kinds of damage they will hold reparable, the judges have been concerned to define the notion of ‘reparable harm’ by identifying its general and permanent characteristics, such as certainty of damage⁴⁴⁷ and legitimacy of the interest affected.⁴⁴⁸

It has been pointed out that the danger of this method is that it may lead to an extended law of delict directed to repairing every loss to everyone. This could be reinforced by the relaxation, on another front, of the limiting factor of the requirement of fault.

An exception in the civil law system is the German civil code which gives a list of reparable harms and, to a lesser extent, the Swiss Code of Obligations.

In civil law, the classic distinction is between material and moral damage. Material damage can be defined as injury to the patrimony, that is to say, to the pecuniary interests of the injured party.⁴⁴⁹ Moral damage is injury that does not directly bring an economically appraisable patrimonial loss, but consists in the perturbation of the plaintiff’s feelings, which can only be measured in a subjective way.⁴⁵⁰

Sometimes, however, it is not easy to isolate alleged moral damage as purely moral, for it may have financial repercussions. For instance, if somebody casts doubts on someone’s professional honor, that will certainly cause moral damage, but it may also cause patrimonial damage if there is a subsequent reduction on the number of customers.⁴⁵¹ It follows that when an injury, independently of its origin, does exercise an influence, even indirectly, on the patrimonial sphere of the plaintiff, it must be considered as material damage. Thus, all disturbances of the conditions of life resulting in an unfavorable economic situation arising otherwise than from the plaintiff’s reduced capacity for work, are generally considered to be material damage.

⁴⁴⁷ Geneviève Viney, *Traité de Droit Civil. Les obligations. La responsabilité: Conditions*. (1982) 338.

⁴⁴⁸ Nour-Eddine Terki, *Les obligations. Responsabilité civile et Régime Général* (1982) 171.

⁴⁴⁹ ‘El daño material consiste en el menoscabo patrimonial sufrido por la víctima y comprende tanto el desembolso efectivo como la ganancia frustrada o que se haya dejado de obtener.’ Ricardo de Ángel Yáguez, *Comentario del Código Civil, Tomo 8* (2000) 387.

‘Il peut d’abord consister en une perte subie –damnum emergens– se traduisant par un appauvrissement de la victime, telle que la destruction ou la détérioration d’un bien, une privation de jouissance ou encore les dépenses inutiles qu’a dû exposer la victime.’ Patrice Jourdain, *Les principes de la responsabilité civile* (1992) 114.

For some historical references about the evolution of the notion of damage in French law: Olivier Descamps, *Les origines de la responsabilité pour faute personnelle dans le code civil de 1804* (2005) 289.

⁴⁵⁰ For a variety of definitions in Argentinian law: Carlos Parrellada, ‘El daño moral’ in Aída Kemelmajer de Carducci (Ed.) *Responsabilidad Civil*. (2007) 346.

⁴⁵¹ Angel Yaguez, above n 442, 390.

Handford⁴⁵² submits that one of the most interesting contrasts between the common law and the civil law is to be found in their attitudes to the recovery of damages for injured feelings and mental distress. In the common law, there has always been marked reluctance to allow any such claim – an attitude summed up a century ago by Lord Wensleydale in *Lynch v Knight*⁴⁵³: ‘Mental pain and anxiety the law cannot value, and does not pretend to redress, when the unlawful act complained of causes that alone.’ He also suggests that the civil law offers a refreshing contrast to the common law, not only because of its wholehearted acceptance of claims for injury to feelings and other non-pecuniary loss, but also because of its orderly appearance in comparison to the patchwork quilt of the common law.⁴⁵⁴

Compensation for non-pecuniary loss is subjected to different restrictions: in contract law, some European countries, like Germany, Greece, and the Netherlands exclude its compensation in money while in tort law, most legal systems limit compensation for moral damage to cases of injury to the person (body, privacy or reputation).

In France, the question whether the law should compensate for *pure moral damage* has been the subject of high controversies in the past. The main arguments against it were that no payment of money could be adequate for moral suffering; that it was shocking to mix money with suffering because true and deep suffering is silent, and that affection and honor cannot be measured in financial terms.⁴⁵⁵ The issue, however, was finally settled by the Court of Cassation in the sense of admitting reparation for moral damage.⁴⁵⁶ At the present, the distress which a person suffers on the loss of a loved one is compensated without even asking if the painful experience actually occasioned psycho-pathological symptoms. The Supreme Court of Spain, expressing the same level of protection, held that ‘un doloroso vacío’ (a painful emptiness), suffices and even owners of unlawfully killed animals have right to compensation for the sentimental value of the loss.

The flexibility of French tort law in relation to claims for non-material damage can be seen in a 1995 *Cour de Cassation* judgment. A woman was hit by a car while cycling and, as a consequence, remained in a vegetative state. The defendant argued that the victim was not

⁴⁵² Peter Handford, ‘Moral damage in Germany’ (1978) 27 *International and Comparative Law Quarterly* 849.

⁴⁵³ (1861) 9 H.L. Cas 577 at 598.

⁴⁵⁴ Handford, above n 445, 851.

⁴⁵⁵ For strong criticism: Paul Esmein, ‘La commercialisation du préjudice moral’. *Dalloz* 1954. Chronique, 113 et ss. G. Ripert, ‘Le prix de la douleur’. *Dalloz*, 1948. Chronique, p. 4 et ss. Boris Starck, *Droit Civil. Obligations*, n° 114. A. Weill et F Terré, *Droit Civil. Obligations*. n° 614. Gabriel Marty et Pierre Raynaud. *Droit Civil. Obligations*. n° 382. Viney, above n 440, n° 266.

⁴⁵⁶ It is generally accepted that the compensability of moral damage was first admitted by the decision of the Full Court of the Court of Cassation on June 15, 1833, accepting the argument of Procureur-Général Dupin. Michel Cannarsa, ‘Personal injury compensation in France’ in Marco Bona and Philip Mead (Eds.) *Personal injury compensation in Europe* (2003) 194.

entitled to compensation for non-material injury because she was absolutely incapable of any feeling, whether pain or a sense of diminution arising out of aesthetically pitiable state, or any appreciation of the loss of life's pleasures and worries. The *Cour de Cassation* reversed the decision of the Court of Appeal and ruled that personal compensation (including pain and suffering, aesthetic damage and loss of amenity) does not become irrecoverable simply because the injured person is not able to feel, as 'no head of damages can be excluded simply because the victim is in a vegetative state'.⁴⁵⁷ Therefore, under the law as it now stands, a permanently comatose victim is fully compensated for his non-pecuniary loss.

The *Cour de Cassation* has presumably based its decision in the line of reasoning of the *Cour d'Appel de Bordeaux*. In effect, in a 1991 decision, this court had said that where the victim is apparently bereft of consciousness and, in any event, cannot give expression to it, it cannot be inferred from that fact that he cannot feel the injuries. Protection of the victim's rights dictates that they are to be assessed not by reference to the feelings of loss, which that person is supposed to have, but by reference to feelings commonly felt as a result of a similar injury by persons able to give expression to their will. Otherwise, the person would be deprived of a part of his rights, without there being however any absolute certainty of a total absence of suffering or feeling of anything connected to pain, to aesthetic detriment or loss of amenity.⁴⁵⁸

In Austria, in 1993, the Supreme Court ruled that the injured person may recover damages for non-pecuniary loss even if he is comatose. The court's argument is that although the claimant is not sensitive to pain he is entitled to claim compensation because of the severe impairment of his personality.⁴⁵⁹

In Germany, a significant change in the interpretation of the courts in relation to comatose plaintiffs has taken place. Until 1992, damages granted to victims unable to perceive the loss of their physical or mental capacity due to the severity of their injuries were

⁴⁵⁷ *X. v Société Transport Agglomération Elbeuvienne*. Cour de cassation, 2ème chambre civile, 22 February 1995. Commentary by Mazeaud, (1995) *Revue Trimestrielle de Droit Civil*. S. Gromb, 'De la conscience dans les états végétatifs et de l'indemnisation'. *Gazette du Palais*, 3 July 1991, p. 7.

⁴⁵⁸ *Salabert v Malaganne*. *Cour d'Appel de Bordeaux*, 18 april 1991. For a discussion of moral damage for persons in vegetative state in Argentinian law: Parrellada, above n 453, 379; Jorge Mosset Iturraspe, 'Daño moral causado a personas privadas de conciencia o razón. Los padres como damnificados directos.' *Jurisprudencia Argentina*, 1992 -V-559; Matilde Zavala de gonzalez, 'Las personas sin discernimiento y las personas jurídicas como sujetos pasivos del daño moral'. *Jurisprudencia Argentina*, 1985-I-794; Alfredo Orgaz, *El daño resarcible*. (1960) 247. Jorge Nunez, 'Estado de vida vegetativo y daño moral'. *Jurisprudencia Argentina*. 1987-I-783.

⁴⁵⁹ Ernst Karner and Helmut Koziol, 'Non-pecuniary loss under Austrian law' in W.V. Horton Rogers (Ed) *Damages for non-pecuniary loss in a comparative perspective* (2001) 9. Ivo Greitzer, 'Personal injury compensation in Austria' in *Personal Injury Compensation in Europe*, in Marco Bona and Philip Mead (Eds.) *Personal injury compensation in Europe* (2003) 30.

regarded as a form of symbolic atonement. The sums granted were significantly lower compared to cases where victims were fully aware of their injuries, but after a leading case in 1993, a comatose plaintiff became entitled to substantial compensation for his non-pecuniary loss. The Supreme Court on that occasion held that damage to the personality and the loss of personal quality as a consequence of severe brain damage represented in themselves non-material harm which was to be compensated for independently of whether the person affected felt the impairment. Damages should be more than just symbolic, because they reflect a loss of personality and human dignity.⁴⁶⁰

In Switzerland, after having denied any right to reparation because the victim was incapable of feeling pain and suffering, the courts have now recognised this right, 'but without enthusiasm'.⁴⁶¹

Some controversial issues remain, like the degree to which compensation can be awarded in respect of the sentimental value of things, such as pets or other objects of little market value but of great importance for the personal well-being of the owner, or others who might also have enjoyed it. Austria and specially France recognize compensation for non-pecuniary damage in relation to things.

In 1962, the owner of a race horse called Lupus was awarded 150.000 francs⁴⁶² for the grief he suffered as a result of the horse's death. In the same year, the owners of a dog recovered (under article 1.385 C.C.) for grief as well as material loss occasioned by the death of their pet.⁴⁶³ Encouraged by these latter decisions, a car owner, in 1966, sought damages in delict to assuage his grief at the damage to his vehicle, but the court decided against him.

In Austria, however, if property is damaged, the person responsible has to pay for the sentimental value only if he acted with malicious intent or gross negligence. On the other

⁴⁶⁰ Ulrich Magnus and Jörg Fedtke, 'Non-pecuniary loss under German law' in W.V. Horton Rogers (Ed) *Damages for non-pecuniary loss in a comparative perspective* (2001)113. Paul Kuhn, 'Personal injury compensation in The Federal Republic of Germany in Personal Injury Compensation in Europe' in Marco Bona and Philip Mead (Eds.) *Personal injury compensation in Europe* (2003) 229.

⁴⁶¹ Pierre Tercier, 'La réparation du tort moral en cas d'inconscience totale et définitive de la victime'. (1972) 68 *Revue Suisse de Jurisprudence* 245. Douglas Hornung, 'Personal injury compensation in Switzerland' in *Personal Injury Compensation in Europe* Marco Bona and Philip Mead (Eds.) *Personal injury compensation in Europe* (2003) 506.

⁴⁶² To have an idea of what that sum represented at the time we can rely on Tunc's commentary that it was equal to three months' salary of a regular worker (56 hours a week.) *Dalloz*, 1987, IR, 72.

⁴⁶³ Those decisions have raised strong criticism. For instance *l'arrêt Lunus* where the Civil Court held that the death of a horse gives right to compensation (14 Janv. *Dalloz* 1962, 199. *Juris-classeur Périodique* with note of Rodière) and another one of the Court of Caen assessing damages to the owner of a dog as compensation for the suffering that the loss of his company represented to the plaintiff. (30 oct. 1962 *Dalloz* 1963, 92) are criticised by Le Tourneau, *La responsabilité civile* (1982)190. For an exhaustive treatment of the sujet: Jean-Pierre Marguénaud, *L'animal en droit privé*. (1992) 482 et ss. Jacques Dupichot, *Des préjudices réfléchis nés de l'atteinte à la vie ou à l'intégrité corporelle*. (1969).

hand, according to § 1325 of the Austrian Civil code, in relation to personal injury, the tortfeasor has to compensate for pain and suffering even if the degree of his fault is very small. Two reasons are given to justify the distinction: a) the lower rank of immaterial interest for property and b) the absence of objective evidence to indicate the extent of the harm.

The reason why compensation in money for non-patrimonial damage is more restricted than for patrimonial damage is that the first one depends on individual conditions and, therefore, it is hardly measurable unless some objective clues are given.⁴⁶⁴ This is seen as a serious disadvantage in the sense that, since the parties are quite unable to anticipate, even in broad terms, what the court may hold to be the appropriate damages, the defendant is in a position to put pressure on the victim to accept an unfavourable compromise or face prolonged and expensive legal proceeding where the result is a matter of chance.⁴⁶⁵

The lack of specific rules governing the assessment of non-patrimonial damage has led to a somewhat irrational process where the only limit is 'the wisdom of the court'. Some rationalization has been tried to be established by some Courts through internal judicial tariffs, like in France *les barèmes d'indemnisation*.⁴⁶⁶ Also a vague orientation has been introduced in some codes. A good example is art. 932 of the Greek Civil Code, under which the satisfaction for moral damage has to be *reasonable*. Professor Kerameus explains that reasonableness is taken to correspond to all circumstances accompanying the particular case, and that Greek courts often enumerate the circumstances that, as a rule, influence their judgement, like the financial situation and social position of the tortfeasor.⁴⁶⁷ This, however, is a criteria not shared by the Austrian Supreme Court which holds the opinion that social position, cultural requirements and financial situation are of no relevance.⁴⁶⁸

In general, it could be said that when immaterial damage is calculated, the common opinion is that the nature, gravity or seriousness and endurance of the harm, as well as the lasting consequences of the injuries have to be taken into account.

⁴⁶⁴ Koziol, above n 452, 12.

⁴⁶⁵ Genevieve Viney, *Introduction a la responsabilite* (1995) 63.

⁴⁶⁶ For some criticism of the use of *barèmes*: Le Tourneau, above n 456, 342.

⁴⁶⁷ Konstantinos D. Kerameus, 'Damages under Greek Law' in Ulrich Magnus (ed.) *Unification of Tort Law: Damages* 110.

⁴⁶⁸ Koziol, above n 452, 13.

1.1 The principle of full compensation.⁴⁶⁹

In civil law the basic rule concerning material damage is *restitution in integrum*; that is, the victim must be compensated for his whole loss. It covers all material injury to the bodily integrity of a person and to his property, including material loss (for instance, loss of financial support) sustained by dependent third parties as a consequence of the death of, or physical injury to, the primary victim. It also covers non-material damage, such as injury resulting from direct interference with the right of personality, for instance damage to one's reputation by defamatory statements; injury consequential on interference with a person's bodily integrity, such as pain and suffering, aesthetic damage or loss of amenity by the primary victim, as well as bereavement or pain and suffering by persons suffering from the death or injury to the physical well-being of the primary victim regardless of the proximity of their relationship.

For many authors, the principle of full compensation comes from art. 1382 in itself.⁴⁷⁰ The *Cour de Cassation* (the French Supreme Court), interpreting that provision, has laid down the following principle: '...the salient feature of civil liability is restoration, in so far as is possible, of the balance which has been upset by the damage and to put the victim back, at the expense of the person responsible, in the situation where he would have been had the harmful act not occurred.'⁴⁷¹

What is substantial on the principle of full compensation is that the rate of compensation is determined by the damage caused, and only by this. That implies that the nature of the loss is irrelevant and, also, that the amount of damages does not depend on the degree of fault on the part of the wrongdoer, but exclusively on the extent of the loss. Therefore, even if only slight negligence has been assessed, the amount of damages to be awarded will not be diminished.

A significant exception is § 1324 of the Austrian Civil Code which establishes that the extent of compensation depends in general on the degree of fault. Only in the event of wilfulness or grave negligence will full compensation be recognised (including non-pecuniary damage). Otherwise, lost profits and immaterial damage will not be compensated.

⁴⁶⁹ For an extensive analysis of the difficulties found by the Courts in the application of this principle in France: Viney, above n 458, 87; in Spain, Angel Yaguez, above n 453, 397.

⁴⁷⁰ Sólyom submits that the drafters of the code leave no doubt as to the extensive interpretation of that provision: '*cette disposition embrasse dans sa vaste latitude tous les genres de dommages...*' and adds that practice on the grounds of that provision, from the very beginning, adjudged the profit lost, and from 1833 ever more decidedly also the moral damage. L. Sólyom, 'The decline of civil law liability.' (1980) 97.

⁴⁷¹ Civ. 2è civ. 28 october 1954, *Juris-Classeur Périodique*. II. 8765.

The inflexibility of this regulation has been criticized because, in many cases, the loss of an expected profit is a more hurtful and heavier damage than the loss of an already existing asset. However, Professor Koziol believes that the importance of § 1324 is minimized by the Supreme Court in holding the opinion that the loss of profits is an actual loss in those cases in which the plaintiff definitely would have made the profit.⁴⁷²

1.2 The scope of protection in France.

The general provisions of arts. 1382 and 1383 do not contain any *a priori* limitations in relation to the scope or nature of protected rights or interests. Those articles refer to fault as a primary source of liability without limiting, or even mentioning, the rights or interests that the system aims to protect. In principle, all rights and interests are protected and it would be unacceptable for a French lawyer to refer to *protected rights* in an exclusionary sense (meaning that there are some other rights which remain unprotected). The idea of *protected* rights or interests under French law is related to the characteristics that it must have in order to be recoverable: it must be certain (this includes the loss of a chance), it must actually exist, and it must be personal to the plaintiff.⁴⁷³

The notion of certainty of harm must not be confused with that of actual harm,⁴⁷⁴ that is to say the harm that has already been realized. Naturally, actual harm is the most certain of all, but not the only one. Some kinds of damage, like permanent reduction of working capacity, extend their effects into the future; therefore, they are not rendered any less certain.

The articles mentioned *ut supra* do not contain any *a priori* limitations in relation to the class of protected persons either. There is no exclusion, and no need to prove the existence of any duty of care towards the plaintiff as in the common law. Any plaintiff who is able to prove damage, fault and causation may claim full compensation. Not even the State will have any particular privilege. All rights or interests, which are protected under French law against infringements by individuals, are equally protected against the acts of public authorities.⁴⁷⁵

Since French law does not provide an *a priori* limitation as to protected interests it has been up to the courts to decide which interests are to be protected and which not, based exclusively on the interpretation of the word *dommage* in art. 1382 C.C.⁴⁷⁶ In that sense,

⁴⁷² Koziol, above n 452, 8.

⁴⁷³ Le Tourneau, above n 456, 167 *et ss.*

⁴⁷⁴ François Terré. *Droit Civil. Les obligations*. (2005), 692 *et ss.*

⁴⁷⁵ Walter Van Gerven, *Torts: Scope of Protection* (1998) 59.

⁴⁷⁶ Cees Van Dam, *European Tort Law* (2006) 143.

French courts showed one of the most prolific, creative and expansive tendencies in the whole civil law world in relation to the heads of recoverable damage. In case of personal injuries, for instance, they continuously discover new types of harm. Thus, after damages for grief, pain and suffering and aesthetic harm, the courts allowed damages for loss of amenity, for impairment of the pleasures of childhood, for diminution of sexual prowess, for gloom due to the prospect of impending death and so on. This permanent increasing liability with constant relaxation of its conditions is criticised by some academics, who believe that is going to increase the cost of insurance to excessive or intolerable levels.

Contrary to German law, to claim for loss of maintenance, French law does not require that the deceased had had an obligation to maintain the plaintiff. It is sufficient that the deceased, in fact, maintained him. It is not necessary to prove family relationships of a formal type (blood or marriage). Also, if a causal connection can be shown, a business partner or an employer can claim damages for the loss suffered.

In the case of death, the question of who can sue for non-pecuniary loss cannot be answered by the over-simple solution of limiting the right of action to the blood relations or marriage. It has long been said that the family could not be considered to have the monopoly of grief, and that in certain circumstances the sincerity of the sorrow experienced by more distant relatives cannot be doubted. Today, it is accepted that blood relationship in the direct line and the relation of marriage both raise a presumption of grief or moral suffering on the part of the plaintiff in the case of the death of a parent, son, daughter, or spouse. This presumption can assist the plaintiff in the matter of proof, but it is not an irrebuttable presumption.⁴⁷⁷

On the other hand, certain persons who can claim neither relationship by marriage nor blood relationship in the direct line, may have a claim in damages if they can convince the court of the sincerity of the grief that the victim's death has caused them. However, in these cases, the burden of proof is on the plaintiff.⁴⁷⁸ The reported cases show that it has become rather frequent for distant relatives (aunts, uncles, cousins) to ask for, and get, damages for

⁴⁷⁷ For instance, it was held by the *Cour de Cassation* that a wife could not get damages for moral suffering when the defendant established that she was intending to divorce from her husband when the accident occurred. *Cour de Cassation*, première chambre civile, 1.7.10.1992. Memetan, 'La réparation du préjudice d'affection ou la pierre philosophale'. *Gazette du Palais*, 78.2 Doctrine 400. Melennec., 'L'indemnisation du quantum doloris.', *Gazette du Palais*, 1974.2 Doctrine 958.

⁴⁷⁸ Recent cases, however, seem to show that the Supreme Court supports distant relatives. In 1994, for example, a claim of an aunt and uncle was dismissed on the ground that they had not established the existence of *specific emotional links* with the primary victim. The case went to the Supreme Court and quashed. For many authors, it seems to mean that mere quality of aunt and uncle is now enough to get damages for moral suffering. Terré, above n 467, 700; Le Tourneau, above n 456, 179.

moral suffering. The Bellet Commission pointed out that in 1979 the average number of relatives compensated for their moral suffering in fatal cases had risen to 5.3 and that it was not infrequent to see cases where damages were awarded to ten relatives.⁴⁷⁹

There is some hesitation about the transmissibility of the victim's action in the cases of instantaneous death. The principle is that any action which the victim, had he lived, would himself have brought against the author of the damage is transmissible and forms part of the decedent's estate. The problem is that if, *ex hypothesi*, there was no time for the suffering to come into existence, the idea of any transmissible moral damage sounds unreasonable.⁴⁸⁰ A decision of the Court of Cassation in 1943 upheld the claim of a mother and daughter who brought an action in damages for moral harm suffered by their husband and father before his instantaneous death.⁴⁸¹

Some doubts also initially surrounded the issue of moral damage on the part of the relatives of the victim in cases where he survives the injuries. *Le préjudice d'affection* (*pretium affectionis*) that is, the moral suffering that relatives experience as a consequence of the victim's personal injury, was only compensated on fatal cases. At the beginning, the Court of Cassation was unwilling to accept this extension of moral damage, limiting compensation to cases of fatal accidents. The position was hard to justify. In many cases, the grief and suffering experienced is as cruel, and very frequently, even more lasting than when the victim dies. Is not difficult to imagine common traffic tragedies where a young person becomes paraplegic leading the whole family into a permanent state of grief. Later the Court admitted that it could be compensated in personal injury cases, providing it was extremely serious. After a decision, in 1946, awarding damages to the father of a little girl permanently crippled as the result of an accident the *Cour de Cassation* settled the question. That last requirement has now disappeared so that moral suffering of the relatives is compensated in all personal injury cases. The awards are almost automatic: in particular, there is no need for the claimants to show that they have suffered a nervous shock. Moreover, they do not have to establish the existence of their *préjudice d'affection*. According to the *Cour de Cassation*, this loss is presumed, at least as far as near relatives are concerned.⁴⁸²

⁴⁷⁹ Galand-Carval, above n 439, 93.

⁴⁸⁰ Herman Cousy and Dimitri Droushout, 'Non-pecuniary loss under Belgian law' in W.V. Horton Rogers (Ed) *Damages for non-pecuniary loss in a comparative perspective* (2001) 38.

⁴⁸¹ Civ., Jan. 18, 1943 D.C. 45 (note L. Mazeaud)

⁴⁸² Galand-Carval, above n 439, 90.

1.3 The scope of protection in Germany.

1.3.1 Generally.

In Germany, the question of protected interest stands oddly apart from other civil law system. In the German Civil Code there is no general delictual principle covering all intentional and negligent harm of whatever kind, as there is in most civil codes. Prof. Zweigert states that the draftsmen who were working on the German civil code were tempted to follow the great model of the French civil code including a general clause, which would impose liability in damages whenever harm was unlawfully, and culpably caused. At the time, it was thought that it would be impossible to secure sufficient protection against unlawful acts by attaching liability to particular types of tortious behaviour, since they might not cover all proper cases.⁴⁸³

Modelled on that idea, the first draft of the BGB laid down the following provision:

§ 704 (1) ‘Where a person commits an unlawful act, whether intentionally or negligently,...which harms another, ...that person shall be required to compensate the other for the damage thereby caused.’

That article, differently from its French model, included the notion of *unlawfulness* which German law had inherited from the Roman law notion of *injuria*.

The first draft code did not meet with favour. A second draft repudiated that model as too widely phrased, and reached a compromise solution instead.⁴⁸⁴ The new drafters decided to avoid the profuseness of the English law of torts and the casuistry of the special types yet stopping short of taking the crucial step of admitting a great general clause like art. 1382 of the French civil code.⁴⁸⁵ It was believed that a general clause would empower the courts too much, which would be inconsistent with the German view of the judicial function.⁴⁸⁶ As the draftsmen themselves explained (Protokoll II), fears existed that unless the Code laid down fixed standard the courts might ‘produce outgrowths such as one finds in many French decisions.’

⁴⁸³ Konrad Zweigert & Hein. Kötz, *An introduction to comparative law* (1977) 599

⁴⁸⁴ For an extensive treatment of this aspect, see Patrick Mossler, ‘The discussion on general clause or numerous clausus during the preparation of the German Civil Code’ in Elto J. H. Schrage (Ed) *Negligence. The comparative legal history of the Law of Torts*. 2001, 361-398.

⁴⁸⁵ It has been pointed out that the more casuistic approach to tort law –well known to Common lawyers- was also the method adopted by Roman law and this, it must be recalled, formed part of the legal heritage of most Germany. Basil Markesinis and Hannes Unberath, *The German Law of torts. A comparative treatise*. (2002) 25.

⁴⁸⁶ Jan Smits, *The making of European Private Law* (2002) 232.

The result was no one general rule, as in the French model, but three general clauses with different heads of tortious liability.⁴⁸⁷

§ 823. Liability in damages.

- (1) A person who, intentionally or negligently, unlawfully injures the life, body, health, freedom, property or another right of another person is liable to make compensation to the other party for the damage arising from this.
- (2) The same obligation attaches to a person who infringes a statutory provision intended for the protection of others.

§ 826. A person who wilfully causes damage to another in a manner *contra bonos mores* is bound to compensate the other for the damage.

Intention and negligence are defined in substantially the same way as in the common law. To base an action on § 823, a plaintiff should prove that there was a violation through human contact of one of the enumerated rights or interests, namely life, body, health, freedom, property, or ‘another right’. Markesinis points out that this approach, in essence, does for German law what the notion of duty of care does for the common law, though it is done in a pre-determined (and thus arguably clearer) manner.⁴⁸⁸

1.3.2 Injury to life.

Injury to life occurs where someone dies as a result of the defendant’s behaviour. This may result from the direct killing of a person or from an injury to his body or health. Direct killing gives no right of compensation to the person killed, but only to certain third parties who depended on him for their maintenance.⁴⁸⁹ To a certain extent, it is surprising that the loss of someone’s life, arguably his most valuable asset, is excluded from legal protection. This paradox has not gone unnoticed in either side of the Atlantic. In France, Viney-Jourdain

⁴⁸⁷ Professor Handford believes that in this sense, German law stands out from civil law systems, and is more akin to the common law. Above n 445, 875.

The provisions on liability for unlawful conduct are to be found at the end of Book Two, which is devoted to the Law of Obligations. Hence, much of the surprise of the common lawyer, the law of tort is not treated as an independent area of law in either the legal literature or the universities of Germany, but always forms just one part of books and courses devoted to the law of obligations. Norbert Horn, Hein Kötz and Hans Leser, *German private and commercial law: an introduction*. (1982) 147. Frederick Holding and Peter Kaye, *Damages for personal injuries. A European perspective*. (1993) 65.

⁴⁸⁸ Markesinis above n 478, 43. Rudolf Hubner, *A history of Germanic Private Law*. (2000) 578.

⁴⁸⁹ Kwame Opoku, ‘Delictual liability in German Law.’ (1972) 21 *International and Comparative Law Quarterly* 232.

have pointed out how a fatal accident suffered by a child, in extreme cases, could cost the person liable a very small amount of money, while simple wounds could justify huge damages to compensate the costs of caring, or an inability to work.⁴⁹⁰ In the United States, Dan Barrett has referred to this particular question under the suggesting title of ‘Cheaper to kill than to maim’.⁴⁹¹

Von Bar maintains that, in spite of the fact that it could be accepted that victims do suffer when death occurs, most European laws draw no consequences from that.⁴⁹² Apparently, the only exception is Portugal, where the courts have decided that loss of life is damage in itself and that the claim for compensation and the deceased’s claim for damages for pain and suffering are inheritable by the heir in addition to his own claim for damages for pain and suffering and other loss. Although instantaneous death is not compensable, if the victim survives, even if it is only for a short time, a claim for moral damage for the sense of fear suffered before bodily injury or death is applicable. If the injury results in a reduction of life expectancy, and the victim is aware of it, the emotional strain also must be compensated.⁴⁹³

In Germany, compensation for loss of life as such will be limited to certain relatives. Who qualifies as a relative, whether for patrimonial or non-patrimonial loss, is a question not free from disputes and it is generally linked to questions of causation (or, sometimes, to the scope of the duty). The general rule, according to § 844 is that only persons whom the deceased had a statutory duty to maintain have a right to compensation.

§ 844 Third-party compensation claims in the case of death.

(1) In cases where death is caused, the person liable in damages must reimburse the costs of a funeral to the person under a duty to bear these costs.

(2) If the person killed, at the time of the injury, stood in a relationship to a third party on the basis of which he was obliged or might become obliged by operation of law to provide maintenance for that person and if the third party has as a result of the death been deprived of his right to maintenance, then the person liable in damages must give the third party damages by payment of an annuity to the extent that the person killed would have been obliged to provide maintenance for the presumed duration of his life; the provisions of section 843 (2) to (4) apply with the necessary modifications. Liability in damages also arises where the third party at the time of injury had been conceived but not yet born.

⁴⁹⁰ Geneviève Viney and Patrice Jourdain, *Les conditions de la responsabilité*. (1998) n. 254.

⁴⁹¹ Dan Barret, *Cheaper to kill than to maim. A patient's guide to medical malpractice in Texas*. (2002)

⁴⁹² Christian Von Bar, *The common European law of torts* (2000) 62.

⁴⁹³ Karner and Koziol, above n 452, 11. Ulrich Magnus and Jörg Fedkte, ‘Non-pecuniary loss under German law’ in *Damages for non-pecuniary loss in a Comparative Perspective*. (2001) 114. *Non-pecuniary loss under Dutch law in Damages for non-pecuniary loss in a Comparative Perspective*..(2001) 161. Miquel Martin-Casals, Jordi Ribot and Josep Solé *Non-pecuniary loss under Spanish law. Damages for non-pecuniary loss in a Comparative Perspective*. (2001) 202.

German law makes a distinction between loss of support, regulated in § 844, and loss of services, which is treated separately in § 845. Since similar rules apply to both, and cases tend to overlap Professor Markesinis doubts that anything is really gained by this distinction between loss of support and loss of services.⁴⁹⁴

According to § 844 only those persons to whom the victim owed a statutory duty to provide support will be allowed to sue (like spouses, direct relatives and adopted children). The right of maintenance should exist at the time of the injury. In contrast with French law, the fact that the plaintiff was actually maintained by the deceased is irrelevant.⁴⁹⁵ As a result of this, a stepson does not have a right to compensation, even though his stepfather maintained him for many years as his own child. Also, a bride who loses her future husband one week before the marriage will not have a right to compensation for loss of maintenance, since the obligation to provide support starts from the day of marriage.⁴⁹⁶

Particular difficulties arise in relation to claims for future maintenance (in cases of death of children). A hard balance has to be reached between avoiding what could be mere speculative maintenance at the time of the accident, and the danger of the claim becoming time-barred if only made after the child is in conditions to provide financial support to his parents. A procedural device has been developed in German law to reconcile these concerns, allowing a declaratory judgment at the time of the trial, with no fixed amount until the parent would actually become entitled to claim maintenance from the child.

1.3.3 Injury to body.

Injury to body includes every adverse effect on corporeal well-being attributable to external factors; that is, all disturbances of a person's physical integrity. These interferences will, in many cases, involve injury to health. Injury to health may take the form of a disturbance of the internal functioning of the body, (such as internal infections, gastro-enteritis, bacterial infection, inhalation of poisonous fumes, etc.) through either physical or mental causes. Therefore, both entail an encroachment of the physical well-being of a person. Mere mental stress does not suffice, but in exceptional cases psychological disorder may be

⁴⁹⁴ Markesinis, above n 478, 927.

⁴⁹⁵ A woman has to be legally married to the man she has been living with, or she will have no claim on his death, even if he has been looking after her for years in a marital kind of way; much less does any claim vest in the person who suffers loss because the death of his contractors prevents or delays the performance of his contract. Horn, above, n 491, 155.

⁴⁹⁶ Van Dam, above n 469, 326.

qualified as a violation of health. Nervous shock is an injury to health within § 823, I BGB provided it results in medically recognisable physical or psychological effects.⁴⁹⁷

Van Dam believes that there is no reason to elaborate the difference between the right to bodily integrity and the right to health, because it is generally accepted that most types of damage to a person's body commonly constitutes an impairment of his health.⁴⁹⁸ Von Bar also thinks there is no need to know how to distinguish between injuries to the body and injuries to health since liability arises in all cases where the consequences of an act can be defined as one or the other.⁴⁹⁹ He also agrees with Van Dam that most types of damage to a person's body commonly also constitute an impairment of his health. It is doubtful, he says, that one can exist without the other and, if, in exceptional cases, a bodily injury is deemed not to constitute an impairment of his health, the starting point is probably wrong. Professor Markesinis, however, emphasises that terminological precision dictates the use of two words (body and health) to describe any adverse interference with the person without consent.⁵⁰⁰

The extension of the body's protection can be deduced from a High Court decision treating the accidental destruction of frozen sperm deposited in a sperm bank as amounting to physical harm.

In 1987, at the age of 31, the plaintiff had to undergo surgery for cancer of the bladder. Knowing that infertility would result from the operation, he requested the hospital to take sample of his sperm and put them into frozen storage. Some time after the operation the plaintiff got married and, since he and his wife wished to have children, he requested that his wife be impregnated with a sample of his sperm. He was then informed that through a mishap, the samples had been destroyed.⁵⁰¹

The Supreme Court (BGH 9 November 1993, NJW 1994, 127) held that, if components are removed, for the purpose of preserving bodily functions, in order to be subsequently reunited with it, then the view taken of § 823, I as affording comprehensive protection of physical integrity whilst preserving the right of self-determination of the holder of the right, must lead to the result that those components, even when separated from the body, retain functional unity with it, from the point of view of the protective purpose of the provision. It thus appears necessary to regard damage to or destruction of such separated body parts as a bodily injury within the meaning of § 823, I and § 847, I of the Civil Code.

⁴⁹⁷ Werner Ebke and Mathew Finkin, *Introduction to German Law*. (1996) 202.

⁴⁹⁸ Van Dam, above n 469, 146.

⁴⁹⁹ Von Bar, above n 486, 70.

⁵⁰⁰ Ibid, 45.

⁵⁰¹ For a similar case in the common law, but reaching the opposite conclusion, see *Yearworth v North Bristol NHS Trust* [2009] EWCA Civ 37.

The judgment gives a broad interpretation to the concept of bodily injury within the meaning of § 823, I and § 847 of the Civil Code. It construes the right to one's body as a legally formulated part of the general personality right (*Persönlichkeitsrecht*) and views as an injury to the body, mentioned expressly in § 823, I alongside the injury to health, any unauthorized interference, not covered by the consent of the holder of the right, in that person's physical integrity. It is said that what is protected by § 823, I is not the material substance, but the existentially determined scope of personality which materializes in how one feels physically. § 823, I protects the body as the basis of personality.

The decision emphasises the need for judicial adjustment to medical advances that enable components to be removed from the body and to be reincorporated in it later, like skin and bone parts intended for transplantation in the person's own body, of eggs removed for fertilization and of blood donation intended for oneself.

Van Gerven, commenting on this judgment, points out that four situations and corresponding legal solutions are distinguished: (i) parts of the body, such as a lock of hair or a tooth, which have become permanently severed from the body, and have thus become goods subject to normal rules on personal property; (ii) separated parts, such as donated blood or organs, destined to be integrated into someone else's body, which enjoy for the time being only the protection afforded to personal property unless in the circumstances of the case the general personality right (*Persönlichkeitsrecht*) take precedence; (iii) parts of a person's body, such as skin, blood or egg-cells, although removed from the body, which are destined to be reintegrated into that person's body, and therefore treated as remaining part of the functional unity of the body and so continue to enjoy the same legal protection as the body; and (iv) organic matter, such as sperm, which is definitively separated from the body, but is destined to be used to perform a typical bodily function, like procreation. In this last situation, the Supreme Court held that § 823, I and § 847, I of the Civil Code should be applied, by analogy with situation (ii).⁵⁰²

Under the same heading, the German Supreme Court has also held that the transmission of the aids virus constitutes an injury to health, even when it has not yet developed into HIV.

⁵⁰² Van Gerven, above n 468, 148-9.

1.3.4 ‘Another right’.

The expression ‘another right’ is rather vague. However, it is certainly not meant to include all kinds of rights or legitimate interests for otherwise the intention of the drafters of the German code not to provide for a general tort, as in article 1382 of the French civil code would be defeated. Although the list of protected interests is not closed, the courts have always interpreted that expression as referring to ‘absolute rights’, that is, those which can be asserted against everyone (contrary to contractual rights, for instance, which exist only towards the contracting party) and ‘real rights’ (property, possession, servitudes, etc.). The *Bundesgerichtshof* (the highest court of civil and criminal litigation) has also recognised a general interest of personality as an *absolute right*.⁵⁰³

In van Gerven’s opinion, the provision in § 823, I whereby *other rights* are protected against unlawful and culpable invasions is vague and imprecise enough to have tempted the courts into interpreting it as covering the particular interest of the plaintiff when there was no other way of achieving a reasonable result. One of those cases is the so-called ‘general right of personality’, (*Persönlichkeitsrecht*)⁵⁰⁴ regarded since 1954 as one of the *other rights* protected.⁵⁰⁵

The origin of the extension of § 823, I is the *Schacht* case.⁵⁰⁶ The plaintiff was the attorney of Dr. Schacht, who had been Economic Minister under Hitler. The defendant was a weekly journal which had published an article objecting to Dr. Schacht’s founding a bank. The attorney had been instructed by Dr. Schacht to send to the defendant, in his capacity as Dr. Schacht’s attorney, a letter demanding that certain corrections be made. The defendant left out parts of the letter and published the rest under the heading ‘Letters to the Editors’ thereby creating the wrong impression that the attorney had acted in a private capacity, supporting Dr. Schacht and expressing his own, personal views rather than those of his client. The Court held that the publication had to be corrected. The reasons given by the Federal Supreme Court were that the defendant had violated the plaintiff’s *general right of*

⁵⁰³ Kurt Markert, *Tort liability for the physical consequences of emotional disturbance resulting from harm or peril to another under Anglo-American and German law*. Thesis, New York, 1959. [microform]

⁵⁰⁴ The *Persönlichkeit*, familiar concept to civil lawyers, has no equivalent in the common law. It is an abstraction which comprises attributes such as amongst others, honour, integrity, image, name, privacy and autonomy. Van Gerven, above n 468, 96.

⁵⁰⁵ Until then the only protection in the field covered in English law by defamation lay in the fact that *Beleidigung* (insulting words or conduct) was a criminal offence, and thus anyone guilty under the appropriate paragraphs of the Criminal Code could be sued for damages under § 823, II –though only for actual, not for general, damage. Hilary Cartwright, ‘The law of obligations in England and Germany.’ (1964) 13 *International and Comparative Law Quarterly* 1325.

⁵⁰⁶ For an English translation, see Markesinis, above n 478, 294-298 (case 19).

personality by publishing the letter in that manner and presenting a false picture of the author's personality.⁵⁰⁷

This is now the legal basis on which claims for damages are made when one's honour is impunged, one's reputation besmirched or one's privacy invaded.⁵⁰⁸ The recognition of a 'general right of personality' as one of the 'other rights' in § 823, I has been described as the most important change in tort law since codification. Although its classification alongside the expressly listed rights in that provision is not self evident, German courts have consistently interpreted the protected rights in § 823, I to be absolute rights, thus entitling the holder of these rights to invoke them *erga omnes*.⁵⁰⁹

1.4 Psychiatric harm in civil law.

One type of injury that gives rise to considerable difficulties in the common law is nervous shock. On the contrary, the question of compensation for psychiatric injury has never been debated as such in France. The discussion of this issue would be considered superfluous in the context of art.1382 of the civil code that establishes liability for all damages. The French courts, by submitting all claims for negligently inflicted damage whether moral or material, to the general principles of liability under art. 1382 C.C. show no reluctance at all to allow an equal treatment for psychiatric and physical injury claims.

Compensation for non-pecuniary loss is deeply rooted in the French legal tradition and it is widely felt among both judges and scholars that it performs the fundamental function of expressing society's acknowledgement of what is currently called the 'eminent dignity of the human dignity.'

The French conception of the *dommage moral* is so wide that there is no legal obstacle for *pure* psychological disorders, provided they are medically ascertained. An interesting example of this can be found in a recent case of the Cour de Cassation (criminal division). A young girl had been repeatedly raped by her father when she was still a minor and as a result, had given birth to a child. The girl sued her father in damages, in her own name and on behalf of her child. It was held that the child, who was aware of his origin and was consequently

⁵⁰⁷ Werner Ebke and Mathew Finkin, *Introduction to German Law*. (1996) 201.

⁵⁰⁸ Horn, above n 481, 147.

⁵⁰⁹ Martin Vranken, *Fundamentals of European Civil Law* (1997) 134.

suffering acute psychological disorders, could be compensated for his ‘severe psychological trauma.’⁵¹⁰

In Germany, courts have not faced similar difficulties as the ones that exist in the common law to state liability for shock injury. There is a well established principle that damages are not limited to physically ascertainable injuries but also comprise impairment of health due to psychological impact.

In view of the broad scope of protection of personal interests provided by § 823, I, it has virtually never been maintained since the enactment of the Civil Code, that a ‘physical impact’ or some similar element should be required to grant relief. The interest of a person’s health, expressly stated in that paragraph, has been construed by the courts to include the entire sphere of bodily integrity, bodily as well as mental and emotional reactions.

Since negligence under German law denotes the nature of certain conduct in an objective sense, it is not necessary to establish that harm to the particular plaintiff was foreseeable in order to hold liable a defendant who is found to have acted contrary to the standards of care. In the absence of something similar to the *Palsgraf* doctrine, the German courts had no legal basis to establish a rule that conduct by which someone was harmed or endangered was not a wrong toward another, who was shocked by the effect of that act. Recovery could only be denied on the theory that there was no ‘adequate’ causal connection between the act and the shock. Thus, a commentator points out that the shock injury problem under German law has always been one of legal or adequate causation, rather than of personal fault and foreseeability.⁵¹¹ Causation through psychic reaction is normally established when there is sufficient certainty that the psychic mediated consequences would not exist without the initial tortious act.⁵¹²

However, in a case decided in 1931, the Supreme Court held that a mother could recover damages for shock injury due to the death of her child, who had been killed by the defendant negligently driving his car. The court pointed out that the issue in that case was not one of liability for indirect damage, which would only be recoverable in situations covered by §§ 844, 845 BGB. Indirect damage, it was said, is that to a person’s property or monetary interests, where such person was not directly affected by the act, as, for instance, in the case of bodily harm to someone employed by another. ‘But in the case of personal damage it has

⁵¹⁰ Cour de Cassation, Chambre Criminelle, 4.02.1998, (1999) *Dalloz*, 445 et seq. note D. Bourgault-Coudeville.

⁵¹¹ Markert, above n 497, 47.

⁵¹² Ulrich Magnus, ‘Remarks on psychic causation’ in Magnus and Spiers (Eds.) *European Tort Law. Liber Amicorum for Helmut Koziol* (2000) 174.

never been contended that the harm must be a direct one. If there is sufficient evidence that the result was adequately caused by the defendant's conduct and that the act was negligent, the plaintiff should have a right of action. That the death of a child by an accident might emotionally upset and shock the child's mother and cause bodily harm to her cannot be considered a highly extraordinary result. It is also reasonable to assume, that such a result was foreseeable. It is not material that the defendant could know that the child's parents were still alive. He should have foreseen only that the parents might be shocked and that the shock might impair their health. It is no unreasonable extension of the scope of personal fault to assume, that this was within the area of reasonable foresight.⁵¹³

In another Supreme Court's decision the child's mother, who was not a witness of the accident that killed her son, but arrived soon after it had occurred,⁵¹⁴ sustained a nervous breakdown and needed medical treatment. The judgment maintained that 'When a mother sustains a nervous shock and illness as a result of her child's death, it cannot properly be argued that this was merely an indirect consequence of the act. The case of physical injury to the plaintiff herself is not comparable to the case of a possible monetary loss of someone as a result of another's death. The mother's injury is a direct consequence of the defendant's negligence, just as the death of the child. If the child had been accompanied by his mother and had been killed before her eyes, nobody would have any doubt that her shock was immediately and directly connected with the accident. That the plaintiff in the present case was not on the scene when the child was killed, is, however, irrelevant in determining liability. This view is consistent with the principle of adequate causation. It is not unlikely that a mother sustains bodily injury from a shock as a result of her child's death. Such result is within the natural course of events.'⁵¹⁵

The cases before the Supreme Court involved only parent-child and husband-wife relationships, where the shock was due to the child's or spouse's death. An intermediate court held that a shock to a parent occasioned by a slight injury to his child was not *adequately* caused by the defendant negligently injuring the child. Whether an apprehension of death to a child or spouse may be considered an *adequate* cause of shock injury, however, has not yet been decided by the highest instance in Germany.

⁵¹³ *Reichsgericht*, Sept. 21, 1931, 133 RGZ 270. Markert, above n 497, 46.

⁵¹⁴ In German law, a secondary victim need not have witnessed the accident; communication by a third party is sufficient to find liability. This approach has been followed in several cases. Cf. Basil Markesinis, *A comparative Introduction to the German Law of Torts*. (1994)124.

⁵¹⁵ *Rechtsgericht*, Jan 8, 1940, 162 RGZ 321. Apud Markert above n 497, 47.

An argument against recovery for emotional distress is the theory called ‘normal risks of life’ (*theorie vom allgemeinen Lebensrisiko*) which proposes that there is a limit to liability, assuming that civil law cannot protect victims from harm which is inevitably linked to human existence, like that of a person who suffers nervous shock from witnessing a car accident on the street.⁵¹⁶ According to this formula, a tortfeasor incurs no liability save to the extent that the level of common risks has been exceeded. Conceived as a corollary of the postulate that liability be limited to the risks which the particular rule was intended to reduce, this formula specifically limits a tortfeasor’s liability to injury only which falls beyond the common risks of life.⁵¹⁷ The receptivity of this theory by the courts, however, is in doubt. In effect, in 1969, the plaintiff suffered a severe nervous shock upon witnessing how her fiancé was struck down by a drunk driver and was killed instantaneously before her eyes. Although she only suffered negligible physical injuries she could recover adequate damages for nervous shock.⁵¹⁸

In Germany, evidence of a medically recognisable illness is necessary to entitle a plaintiff to compensation for psychiatric injuries.⁵¹⁹ The reactions must be serious and lasting. Minor impairments of sleep do not suffice. In 1971, the Supreme Court held that ‘liability for harm physically occasioned... must be limited to cases where the man in the street and not only a medical practitioner, would describe it as injury to...health...Injuries which are medically ascertainable but do not amount to a shock to the system must go uncompensated...No claim can be made in the normal case of deeply felt grief...’⁵²⁰

§ 823, I requiring injury to health represents a serious obstacle for most claimants. Therefore, there are only two circumstances in which mental suffering will be compensated: a) when it results from a true violation of a person’s body; b) in default of that, if it manifests itself as mental illness; that is, a traumatic injury which exceeds the level of pain, grief and despair usually encountered in situations of tragedies (for instance, a mental depression, or changes in personality). If the victim does manage to overcome this hurdle, he must

⁵¹⁶ A commentator doubts whether the facing of horrifying scenes which the observer cannot avoid to observe and which make him ill should be regarded as normal daily risks or whether these are costs of (especially) modern traffic and/or modern technology which should not be externalised but be borne by those who created the risk and benefit from it. Magnus, above n 506, 170.

⁵¹⁷ John G. Fleming, ‘Distant shock in Germany (and elsewhere).’ (1972) 20 *American Journal of Comparative Law*, 491.

⁵¹⁸ The Supreme Court, however, has recently reaffirmed that ‘a tortfeasor is liable for the psychological effects of an accident for which he is responsible and is relieved of liability only in cases where the adverse psychological consequences can reasonably be said to be just part of the normal hazards of life, for then there is no connection of unlawfulness between the act and the neurosis’. BGH, 9 april 1991. Apud, Van Gerven, above n 468, 92.

⁵¹⁹ Magnus, above n 506, 170.

⁵²⁰ Markesinis, above n 478, 110.

subsequently bypass the test of the *adequate* cause (*Adäquanztest*) and, in the case of secondary victims, prove that the *indirect violation* could have been foreseen. Markesinis claims that this reliance on the *Adäquanztest* shows the tendency of German law (and modern civil law in general) to use normative concepts of causation in cases where common lawyers would more evidently have recourse to the notion of duty of care.⁵²¹

The psychic reaction of the victim must not constitute an evidently unreasonable kind of reaction to the incident. The severity of the incident that triggered off the shock is an important criterion when judging whether the injury thus sustained can be regarded as a *reasonable* reaction to the event. A shock due to the witnessing of the death of one's dog,⁵²² the witnessing of minor damages to personal property, or to police investigations which were initiated by false allegations do not suffice.⁵²³ Janssens sees a very contrasting difference between this requirement and the French liberal attitude towards granting damages for the anguish felt, e.g. when one's dog loses an eye in a dogfight, or rolls of film containing sentimental pictures disappear in a photoshop through negligence.⁵²⁴

The reasonability of the reaction is by no means influenced by the fact whether the plaintiff was physically proximate at the time of the accident. Physical proximity under German law is, therefore no prerequisite.⁵²⁵ On the other hand, the severity of the incident that triggered off the shock is an important criterion when judging whether the injury thus sustained can be regarded as a reasonable reaction to the event.⁵²⁶

A mental predisposition or anomaly of the victim is generally of no consequence in regard to the responsibility of the tortfeasor; the 'thin skull rule' extends to psychiatric injury cases.⁵²⁷ The Supreme Court, in a case where the plaintiff committed suicide three years after a car crash, held that his psychological condition was a result of the accident, regardless of his tendency towards depression and sadness. Magnus notes that even if there were a causal connection between the suicidal act and the initial injury sustained, the tortfeasor would not

⁵²¹ Markesinis, above n 478, 122.

⁵²² Neither when the allegedly shock-injury was caused by a small good-natured dog which was barking at the plaintiff. The court denied that the harm was '*adequately*' caused by the defendant's dog, since it was totally undangerous, so that it was highly extraordinary that harm of any kind could be inflicted under the circumstances. Reichsgericht, Dec. 9, 1907, (1908) Das Recht. Apud, above n 496, 26. Also when severe and permanent mental damage results after harsh but not unusual dispute. Magnus, above n 505, 171.

⁵²³ However, Markert refers cases where redress was allowed to a plaintiff who had suffered emotional distress resulting in a heart attack when wrongfully imprisoned by a police officer (*Reichsgericht*, Dec. 21, 1917, 91 RGZ 347) and to a civil servant who sustained a nervous disease as a result of a permanently bad and violent treatment by his superior (*Reichsgericht*, Feb. 11, 1913. Das Recht 1133. Markert, above n 496, 26.

⁵²⁴ Janssens, above n 109, 99.

⁵²⁵ Markesinis, above n 478, 104.

⁵²⁶ Janssens, above n 109, 98.

⁵²⁷ Magnus, above n 506, 174.

be held liable for any economic loss arising from the suicide itself.⁵²⁸ However, the courts have limited liability in cases of victims instrumentalizing an injury in pursuit of a neurotic desire for maintenance and security (so-called *Rentenneurose*).⁵²⁹ The amount of compensation granted may be lower if a mental predisposition would have led to similar results without the accident in question.

Where the psychiatric injury arises from an injury to a third person the courts normally require a close personal relationship between the shocked victim and the third person.⁵³⁰ Under the German legal system only near relatives (children, parents and spouses) of the direct victims qualify for compensation. However, this rigid categorization has not found full application as damages have been awarded to the fiancé, life-partner of the victim and *nasciturus*. Mere friends, acquaintances or, in general, those who do not have a personal relationship with the victim, do not qualify and are excluded from recovery. Suggestions have been made, however, to create a possibility for bystander recovery when the accident was particularly gruesome or was caused intentionally rather than negligently.⁵³¹

In The Netherlands, since the horrific circumstances of the so called taxi-bus case, a more flexible approach is developed. A 5-year old girl was, while riding her bicycle close to her home in a residential quarter, overrun by a bus that actually rode over the girl's head. Her mother was immediately warned by one of her neighbours and found her daughter with her face turned to the ground. First, the mother ran back to her house to call an ambulance; then she hurried back to the site of the accident. There she tried to turn her daughter's head to look her in the face. While doing so, she experienced that her hand disappeared into the skull of the child and she noticed that the substance next to the girl's head was not, as she assumed, her vomit, but appeared to be the girl's brains. The mother consequently suffered severe mental illness.

According to Dutch law these cases concerning 'nervous shock' are problematic, because the legislator has explicitly decided that under Dutch law there is no claim for non-pecuniary damages subsequent to death of a relative. For a long time the question was, under which circumstances this decision would leave space for a claim concerning psychiatric illness in case of loss of a relative.

⁵²⁸ Ibid. p. 87. For a similar case in the common law, but different result, see *Corr v IBC Vehicles Ltd.* [2008] 1 AC 884.

⁵²⁹ The term refers to a neurotic reaction which is exclusively motivated by the victim's wish to get a rent and to be protected against difficulties and necessity to earn money by himself. Magnus and Fedtke, above n 453, 110. Janssens, above n 109, 88. Magnus, above n 506, 174.

⁵³⁰ Ibid, 171.

⁵³¹ Janssens, above n 109, 98.

That was the first occasion in which a right to compensation of non-pecuniary damages was awarded to a mother who lost her child in a traffic-accident. The Supreme Court decided that the act committed towards the child, in those circumstances, must also be regarded as tortious towards the mother. However, according to the Supreme Court, a distinction should be made between the consequences of the child's death, for which no non-pecuniary damages may be awarded, and the consequences of the confrontation with the accident, for which damages may indeed be awarded.

At the present, the legislature is reconsidering its decision regarding the ban of non-pecuniary damages in case of loss and serious injury of a relative. They are working on a proposal that grants certain relatives (including the parents of a deceased child) a fixed amount of non-pecuniary damages of 10.000 Euros.

1.5 Conclusions.

The extensive research developed along this chapter clearly indicates that, despite the proliferation of cases in which the issue of psychiatric harm has been considered, dissected and analysed by the highest courts of many jurisdictions in the common law, and the fact that in many instances this type of loss is now recoverable where once was refused, too much uncertainty still remains. After analyzing hundreds of decisions in five different common law jurisdictions, and reading about all the reasons and arguments in favour of the categorization of psychiatric harm as a special area of the law, this researcher is still reluctant to accept that a person should not have a right to his or her psychological integrity as he or she has to his or her body, or that there is any sensible basis for treating psychiatric damage as less deserving of the law's protection.

From the comparative point of view, it has been shown that in Germany, victims of psychiatric injury must meet the criteria of § 823 I BGB, which demand evidence of an injury to health. As most claimants cannot meet this demand, German law consequently appears significantly restrictive.

Because recovery for psychiatric harm is rather more limited in German law than in most other civil law countries, the jurisdiction that probably appeals for more attention is France. In French law, there are no statutory provisions dealing specifically with the issue of damages for psychiatric injury. '*Dommage*' is not qualified in article 1382. Consequently, damages for psychiatric harm is by no way excluded by the Civil Code. The fundamental principle of the general regime of civil liability is total reparation, according to which the

balance upset by the injury must be re-established. The control mechanism against unlimited loss in the civil law lies not in the type of loss but in the factual determination of whether the loss is a direct, certain and immediate result of the negligence. The simplicity and efficiency with which the French system deals with psychiatric harm should be taken as an invitation for the reflection whether the time has not arrived for the common law system to discard all artificial distinctions and simply adopt a foreseeability test with traditional negligence control mechanisms such as fault and causation. The French law system and its derivatives provide the strongest empirical evidence that the absence of a formal rule precluding or excessively limiting psychiatric harm will not inevitably descend into cataclysmic chaos.

PART II: ECONOMIC LOSS.

Introduction.

There is no easy definition of economic loss. It has been said that, in one sense, all loss is economic, in that the victim is complaining that something that belongs to her or him, be it the victim's body, car, or house, is worth less as a result of the wrongdoer's commissions or omissions, and as a result of which the victim wants compensation in the form of money. However, the term 'economic loss' in the law of torts is generally used as opposite to personal injury or physical damage to property. A commentator has more distinctly defined pure economic loss as 'the financial harm arising out of wrongful interference with plaintiff's contractual relations or with his or her non contractual prospective gain.'¹

Tort law has consistently struggled to find a satisfactory response to claims for pure economic loss suffered due to negligence. Whilst it is accepted in the common law that such losses will be treated differently from claims for physical damage, the exact boundaries remain a matter of dispute. Common law courts find a number of valid reasons for distinguishing negligence claims for pure economic loss from negligence claims for personal injury or damage to property. One could think (at least, a civilian would do so) that to isolate economic loss from physical harm is already enough. However, that is only the first stage of the analysis. The system still requires identifying significant differences among several categories of cases.

A brief overview of this area of the law reveals that economic loss can result from an infinite variety of factual situations. There are, however, several clear categories in which certain duty issues stand out: misstatements, relational economic loss, defective products or building structures, among others (the classic distinction by Feldthusen recognizes five categories of claim) plus a series of isolated cases without other connection than the simple fact that they represent financial losses.² I have chosen three of them (together with a residual category) with the conviction that they represent a solid starting point for analysis and discussion of the law. It is expected that these different categories grouped around common policy concerns will illuminate better why recovery should be limited and thereby explain the rational development of this area of the law. In that sense, the purpose of the first part of this

¹ Mario Rizzo, 'A theory of economic loss in the law of torts'. (1982) 11 *Journal of Legal Studies* 281.

² Bruce Feldthusen, *Economic Negligence. The recovery of pure economic loss*. (2000)

chapter is to describe how common law courts try to articulate and justify that substantial difference between claims for personal injury and property damage and claims for economic loss in which they believe.

On the second part, there is a complete different starting point. The civil law jurisdictions of France and the countries that follow its pattern make no distinction between physical and economic damage. French law contains no independent category for pure economic loss as the courts do not distinguish between different heads of damage. Loss of any type is recoverable wherever fault, damage and a direct and immediate causal connection between the two are established. Thus, in principle, pure economic loss is recoverable. However, whilst recovery in French law is far more generous than in the common law, it should not be assumed that liability will be unlimited. The courts have, in practice, severely restricted it through the use of causative devices and a normative understanding of the notion of damage requiring proof that the loss caused by the fault of the defendant, is certain, immediate and direct. So much so that, Professor Durry, referring to pure economic loss involving *ricochet* damage in the case of fatal injuries, was prepared to admit that French law follows a well-known dialectical pattern: in theory it allows extensive compensation but in practice it limits it to a closed list of relatives.³ The system works perfectly well in avoiding the threat of unlimited liability and is certainly a wakeup call to the reflection of whether the common law should not change its focus entirely to a concern with causation as the limiting factor.

German law, in contrast, starts from a position of non-recovery. Pure economic loss is not an interest protected by § 823, I of the civil code. Nevertheless, the courts, reasoning by analogy, have developed the ‘right to an established and operative business’ or utilized other paragraphs of the BGB to permit recovery, for example § 823, II (breach of a statute designed to protect another) and § 826 (deliberate harm to another contrary to *bonos mores*), as well as the notion of ‘contract with protective effects for third parties’.

Whilst the German concept of protected interest is closer to the position in the common law, in that an established rule of non-recovery has been attenuated by jurisprudence, the emphasis remains on the establishment of bases for recovery rather than a satisfactory justification for the exclusion of claims.

In spite of the fact that I have mainly concentrated on French and German law, some other countries are also contemplated.

³ Georges Durry, (1976) *Revue Trimestrielle de Droit Civil* 132, 134.

Although the ideal comparison would be with equivalent categories of the ones already consolidated in the common law, the fact of the absolute absence of the notion of 'economic loss' in some cases and the completely different approach in others, did not allow me to do that. Instead, I have chosen to refer to some typical situations, such as the cable cases, auditor's liability and others that have received special consideration from the civil law courts.

CHAPTER 3: THE COMMON LAW

2. 1 The rule in *Hedley Byrne v Heller*.

2.1.1 Background.

When can an action be maintained for negligence in the use of words? Is there ever a legal duty, except when created by contract, to be careful in the use of language?

It is settled law that where negligent words cause physical injury, the law that applies can be found in the general principles of ordinary negligence.⁴ If, for example, a statement is negligently made that a wall is safe, and others rely upon that and suffer injury when the wall collapses, this will give rise to a claim in negligence.⁵ But the problem that focuses our attention now is when a misstatement causes not physical, but economic loss. The situations that arise are almost exclusively in the context of commercial dealings.

In a strict sense, words are acts. However, the common law has always circumscribed more closely the scope of liability for negligent statements than for negligent acts.⁶ But, what are the intrinsic differences between words (spoken or written) and other acts, which justify a different treatment?

It has been submitted that even if the law recognizes that there may be such a thing as a duty to be careful in the use of one's tongue, it does not necessarily follow that the duty should be held to be as universal and as far-reaching as the duty to be careful in the use of one's axe. On the one hand, negligence in the use of tangible objects is, in the great majority of instances, much more likely to cause serious damage than negligence in the use of language. On the other hand, a duty to be careful on ordinary occasions in the use of language is a more burdensome restriction on humanity.⁷

The difference might justify the imposition of a duty of care in the use of words in a more restricted class of cases, but it would not justify the view that no duty of care in the use of language should ever be imposed under any conceivable circumstance.

Another judicial caution in this area recognizes that liability for negligent words, usually involving economic harm, can have a ripple effect which may lead to liability in an indeterminate amount, for an indeterminate time to an indeterminate class.⁸

⁴ Stephen Todd, *The Law of Torts*. (2009) 199.

⁵ M.A. Jones, 'Negligently inflicted psychiatric harm: is the word mightier than the deed?' (1977) 13 *Professional Negligence* 113.

⁶ Jane Swanton, 'Concurrent liability in Tort and Contract' (1996) 10 *Journal of Comparative Law* 32.

⁷ Jeremiah Smith, 'Liability for negligent language' (1900) 14 *Harvard Law Review* 195.

⁸ *Ultramares Corp v Touche, Niven and Co* 255 NY 170: 174 NE 441 at 444 (1931).

A negligent misrepresentation is a negligently arrived at erroneous conclusion of fact uttered under such circumstances that the utterance would not have been made by an ordinary prudent person unless he or she had first used due care to ascertain the truth. The negligence consists not merely in arriving at the wrong conclusion but also in speaking under such circumstances that a reasonable man would have felt himself constrained not to speak unless he had investigated the facts.⁹

In the nineteenth century, claims of misrepresentation were limited to the intentional tort of deceit, which required proof of actual fraud, as opposed to mere negligence, in the making of the statement. The law of contract was the main avenue of recovery, naturally limited to situations in which consideration had passed between the parties in privity with one another.¹⁰

In England, the courts refused to recognize a cause of action for negligent misrepresentation. The House of Lords, in 1889, had precluded any development of the action through its decision in *Derry v. Peek*.¹¹ In that leading case, which ‘embodied into English law the strongest form of nineteenth-century *laissez-faire*’,¹² it was held that the action could not be maintained against a defendant who had made his statement in good faith, even though his honest belief in the truth of what he said was an entirely unreasonable one. Judged by the low standard of commercial morality which at that time commended, there could be no fraud without dishonesty and credulity did not amount to dishonesty.¹³

In *Derry v. Peek*, the directors of a tramway company stated in their prospectus that they had the right to use steam power. They knew, but did not mention that the approval of the Board of Trade was required and they expected that there would be no question of its being refused. The consent was never obtained, and the stock was worth less than if the company had had the right to use steam. Sir Henry Peek, a stockholder who had purchased on the faith of the prospectus, sued the directors for deceit in making the above positive representation.

At first instance, Justice Stirling gave judgment for the defendants on the ground that an innocent but negligent statement, however unreasonable it might be, was not sufficient to support an action for deceit. The Court of Appeal reversed the judgment holding that acting

⁹ (Note) ‘Tort liability for negligent language’. (1928) 28 *Columbia Law Review*, 216.

¹⁰ Feldthusen, above, n 2, 23.

¹¹ (1889), 14 App.Cas. 337 (H.L.).

¹² Robert Stevens, ‘*Hedley Byrne v. Heller*: Judicial creativity and doctrinal possibility.’ (1964) 27 *Modern Law Review*, p. 121.

¹³ A.M. Honoré, ‘*Hedley Byrne & Co., Ltd. v. Heller & Partners, Ltd.*’ (1964-65) 8 *Journal of the Society of Public Teachers Law* 294.

honestly but unreasonably in this way might ground liability. The directors had negligently made a false statement of fact for which they were liable, although they had not done so with any fraudulent intent. Sir James Hannen said: 'It appears to me that nothing can morally justify a man in stating a thing as a fact, as existing at present, because he expects that it will exist in the future.'¹⁴ The court was therefore prepared to consider this a form of legally recognizable carelessness.

In a note on this case, Sir Frederick Pollock welcomed the decision of the Court of Appeal saying that 'the law is rapidly tending towards the enforcement (contrary, no doubt, to old authorities and to some recent ones) of a general duty to be careful, as well as to abstain from willful harm, in statements as well as in acts.'¹⁵

Pollock was unduly optimistic in his prophecy, for it took the law exactly seventy-five years to reach the conclusion that he supported in 1889.¹⁶ He could not imagine that in the following year, the House of Lords would unanimously reverse the decision of the Court of Appeal and hold that however negligent the directors might have been in misstating the facts in the prospectus, they could not be held liable for the tort of deceit if they had not known that their statement was untrue, or concerning the truth of which they were indifferent. Later, that year in another article entitled *Derry v Peek in the House of Lords*, Pollock criticized this decision in strong terms, saying that 'the House of Lords had dangerously relaxed the legal conception of honesty in the statement of facts, and that it would do no good, to say the least, to commercial morality.'¹⁷ In the years following that decision, he used the case notes section of the *Law Quarterly Review* to mount a sustained and uncompromising crusade against it¹⁸, appealing 'to every tribunal which is at liberty to disregard it'.¹⁹ '*Derry v. Peek*', he lamented, 'is now law, though bad law,'²⁰ for it 'encourages practices which may easily go to the very verge of fraud.'²¹

¹⁴ At 584. Pollock thought that this was really the main point of judgment which had been reversed in the House of Lords. He said it was difficult to believe that the House of Lords in its judicial capacity would regard it as morally justifiable to say that I have a hundred pounds at the bank when I mean that I have not any such sum, but have reason to hope that my banker will give me credit to that extent. Frederick Pollock, '*Derry v. Peek in the House of Lords*'. (1889) 5 *Law Quarterly Review*, 421.

¹⁵ (1889) 5 *Law Quarterly Review* 103.

¹⁶ Arthur L. Goodhart, 'Liability for innocent but negligent misrepresentations'. (1964) 74 *Yale Law Journal*, p. 289.

¹⁷ Pollock, above n 14, 422.

¹⁸ Neil Duxbury. *Jurists and Judges. An essay on influence*. (2001) 86.

¹⁹ Frederick Pollock, '*Derry v. Peek in the House of Lords*.' (1889) 5 *Law Quarterly Review*, 410. In 1893, in a letter to Holmes he called *Derry v Peek* 'my enemy', in M de Wolfe, *The Pollock-Holmes letters: Correspondence of Sir Frederick Pollock and Mr. Justice Holmes, 1874-1932*. (1942), Vol. 1, 49.

²⁰ Frederick Pollock (1892) 8 *Law Quarterly Review*, p. 7.

²¹ Frederick Pollock (1893) 9 *Law Quarterly Review*, p. 202.

In the course of his judgment, Lord Bramwell said that: ‘To found an action for damages there must be a contract and breach, or fraud.’²² It is this statement which caused the courts in subsequent cases to adhere to a restrictive principle even though this case had dealt only with the fraud aspect of the director’s misstatement, and had not even considered what their position might be in negligence.²³ In his speech, Lord Herschell said:

First, in order to sustain an action of deceit, there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is shewn that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false.²⁴

In what is considered the early leading article on the subject, Smith submits that taking the facts to be as they were understood by the Law Lords, the decision of the House of Lords seems to be correct. The action, though brought under the modern forms of procedure, was, in substance, the old action on the case for deceit, and it was so treated by the counsel on both sides and by the judges.²⁵ In such an action the plaintiff alleges that the defendants have consciously falsified; i.e. that they have stated what they did not believe to be true. He cannot maintain this allegation by showing merely that they have stated what they ought not to have believed.²⁶ An action of deceit based on fraud cannot be supported by proof of negligent misrepresentation.²⁷

The question remained whether the plaintiff would have succeeded if he had sued for negligence, alleging a duty on the part of the defendant to use reasonable care. The decision,

²² At 374.

²³ Robby Bernstein, *Economic loss*. (1998) 536.

²⁴ At 360-361. The last idea was expressed by Lord Blackburn in the House of Lords some years before *Derry v Peek*: ‘If when a man thinks it highly probable that a thing exists, he chooses to say he knows the thing exists, that is really asserting what is false – it is positive fraud.’ *Brownlie v Campbell*, 5 App. Cas. 925, 953.

²⁵ However, Reed argues that since *Burrowes v. Locke* (1805) 10 Ves. 407 it became common to describe negligently made misstatements as ‘legal fraud’, to distinguish that ‘fraud’ which made a misrepresentation actionable from the ‘fraud’ which meant dishonesty. It was the former definition that the Court of Appeal attempted to apply to actions for deceit. To the objection that the House of Lords were correct to reject the equitable notion of fraud, for deceit was a purely legal action, he argues that s. 25 (11) of the Judicature Act 1873 provided that where there is conflict between law and equity with reference to the same matter, equity should prevail; and equity had long recognised that it had a concurrent jurisdiction with law over ‘fraudulent’ misstatements. The argument, however, was not put to their Lordships. C M Reed, ‘*Derry v. Peek and negligence*.’ (1987) 8 *Journal of Legal History*, p. 73. Smith also submits that it was long understood that, whatever might be the rule at law, a remedy for negligent misrepresentation would be allowed by courts of equity in all cases falling within their jurisdiction. Jeremiah Smith, above n 7, 191.

²⁶ Anson disagrees with both Courts to the existence of an honest belief. He submits that the directors stated that as true which they knew not to be true, though they believed it would certainly and very shortly be true. William R. Anson, ‘*Derry v Peek in the House of Lords*’. (1890) 6 *Law Quarterly Review*, 73. In fact, it appeared from the evidence of the directors that some of them had read the Act, and others were not sure whether they had read it or not. They knew that there were some conditions as to consent, but supposed that the necessary consents were so sure to be given that they might be considered as *practically* given, and it was not worthwhile to mention them. Pollock, above n 14, 420.

²⁷ Smith, above n 7, 185.

being as it was, a reflection of an era, would probably not had led to a different result had the action been phrased in negligence.²⁸ Lord Herschell, who gave the principal opinion, assumed that an action for negligence could not have been maintained. Smith, however, argues that this assumption was, at the most, a mere *dictum*, because the point was not, and could not have been, there decided for it was not before the court. The only question was whether the action for deceit would lie.²⁹ Fridman agrees, saying that Lord Herschell did not discuss anywhere the question of an action for negligence, except when he spoke of lack of reasonable grounds of belief (that is, negligence), and this was only because such conduct was material to the question whether in itself (without evidence or proof of actual fraud) it was sufficient to found an action for deceit.³⁰

In any event, the implication that no action would lie in negligence for misrepresentation causing financial harm was certainly assumed by bench and bar and the case was so interpreted in England³¹ and in the United States³², and whatever the merits of that decision³³, the fact remains that it was an effective barrier to granting a remedy for negligent misstatements for more than seventy years.

Three years later, in *Le Lievre v. Gould*³⁴, a surveyor had provided a builder with some certificates as to the progress made at various stages in the building of some houses. The plaintiff, as the builder's mortgagee, advanced some money to him from time to time on the faith of these certificates. Due to the surveyor's negligence, the certificates contained untrue statements as to the progress of the buildings, but there was no fraud on his part. The Court of Appeal held that the surveyor was not liable to a third party to whom it was shown, and who relied on it in taking a mortgage.

Lord Esher said that 'in the absence of contract, an action for negligence cannot be maintained when there is no fraud.' Bowen L.J. rationalized the policy underlying this view by explaining that the law of England 'does not consider that what a man writes on paper is

²⁸ Lawson says that the forms of actions had already gone in 1889 and it seems that similar cases would still, apart from statute, be decided in the same way even if brought in negligence. Frederick Henry Lawson, 'The duty of care in negligence: a comparative study.' (1947) 22 *Tulane Law Review*, 111.

²⁹ *Idem*, p. 186.

³⁰ G H L Fridman, 'Negligence by words' (1954) 32 *Canadian Bar Review* 641.

³¹ Stevens, above n 12, 133.

³² William L. Prosser, *Handbook of the law of torts* (4th ed. 1971), p. 699-700

³³ Williston submitted that the law of misrepresentation as laid down in *Derry v Peek* was hopelessly inconsistent with the law governing misrepresentation when relied on as the basis of warranty or estoppel considering a just ground of reproach to the law when a harmonious doctrine could not be developed. Samuel Williston, 'Liability for honest misrepresentation'. (1911) 24 *Harvard Law Review*, 435.

³⁴ [1893] 1 Q.B. 491 (C.A.).

like a gun or other dangerous instrument; and, unless he intended to deceive, the law does not, in the absence of contract, hold him responsible for drawing his certificate carelessly.³⁵

Goodhart has said that the comparison of a piece of paper on which something is written with a gun was not a particularly happy one; as a writing may be just as dangerous as any weapon; as many persons have discovered at their cost.³⁶ On the same point, Professor Seavey said that words may be as dangerous as guns, and gave the example that arsenic labeled salt is more dangerous than dynamite labeled dynamite.³⁷ Smith submitted that the argument is beside the real issue, because no one contends that the utterance of non-defamatory language belongs to the class of extra-hazardous acts where the actor is held to the liability of an insurer; like the keeper of a tiger. He concludes that disclaiming such a rigorous rule, the question is whether there may not be in some cases a duty to use reasonable care in the utterance of language.³⁸

Bowen L.J. went on to say that:

Derry v Peek decided that in cases like the present (of which *Derry v Peek* was itself an instance) there is no duty enforceable in law to be careful. Negligent misrepresentation does not amount to deceit, and negligent misrepresentation can give rise to a cause of action only if a duty lies upon the defendant not to be negligent, and in that class of cases, of which *Derry v Peek* was one, the House of Lords considered that the circumstances raised no such duty.³⁹

Fridman submits that the comparison with *Derry v Peek* was unjustified. In effect, he argues that the persons sued in *Derry v Peek* were directors of a company, with which the plaintiff entered upon a contractual relationship by the purchase of shares. In other words, there was an element of contract about the whole affair. In *Le Lievre v Gould*, on the other hand, there was not the slightest evidence of any contractual relationship existing between the plaintiff and the defendant. Deceit, he says, though an action in tort, in many ways approximates to an action for rescission of contract and damages for fraudulent misrepresentation. That is why in *Derry v Peek*, in view of the contractual aspects of the case, fraud, not merely negligence, was a necessary element in the plaintiff's case. But why should this have been so in *Le Lievre v Gould*, which was a case of pure tort since there is no juridical connection between the tort of negligence and an action for breach of contract.⁴⁰

³⁵ At 502.

³⁶ Goodhart, above n 16, 291.

³⁷ W Seavey, 'Candler v. Crane, Christmas & Co.: Negligent misrepresentations by accountant'. (1951) 67 *Law Quarterly Review*, 472.

³⁸ Smith, above n 7, 190.

³⁹ At 501.

⁴⁰ Fridman, above n 30, 645.

The facts of *Le Lievre v Gould* have been described as ‘rather obscure’.⁴¹ Seemingly, the main difference with *Candler v Crane, Christmas and Co* and others of the kind is that the precise transaction for which the certificates would be relied on was not known to the defendant.⁴² However, it has been submitted that the purpose for which a builder might use a certificate could hardly be unconnected with obtaining payment or raising a loan from a third party.⁴³

The first effort to curb the impact of *Derry v Peek* was *Nocton v Ashburton*.⁴⁴ In that case, a solicitor advised the plaintiff to release part of a mortgage, so that the security became insufficient and he suffered loss. The trial judge found as a fact that the defendant had not acted fraudulently, but simply negligently and so he was constrained by *Derry v Peek*. The House of Lords, however, held Nocton liable for breach of a fiduciary obligation owed as a solicitor to client.

No doubt Pollock in his campaign had been active behind the scenes. In a letter to Holmes he rejoices:

Haldane asked me last week to a tobacco talk of *Derry v Peek* and the possibility of minimizing its consequences. The Lords are going to hold that it does not apply to the situation created by a positive fiduciary duty such as a solicitor’s, in other words, go as near as they dare to saying it was wrong, as all in Lincoln’s Inn thought at the time.⁴⁵

In fact, Haldane L.C., presiding, held that in the absence of fraud, a solicitor still owed a fiduciary or quasi-fiduciary duty towards those with whom he is not in contractual relations. He referred to various situations in which liability had been imposed on defendants for their negligent acts or omissions which had injured the property or persons of others, and then he continued:

Although liability for negligence in word has in material respects been developed in our law differently from liability for negligence in act, it is nonetheless true that a man may come under a special duty to exercise care in giving information or advice... Whether such a duty has been assumed must depend on the relationship of the parties, and it is at least certain that there are good many cases in which that relationship may be properly treated as giving rise to a special duty of care in statement.⁴⁶

Gordon finds that Lord Haldane’s dicta were very vague and suggests that what those ‘special relations’ could be was never explained. In fact, how far he had intended to go is not

⁴¹ Honoré, above n 13.

⁴² Feldthusen, above n 2, 25.

⁴³ Honoré, above n 13, 288.

⁴⁴ [1914] A.C. 932. [1914-15] All E.R. Rep. 45 (H.L.).

⁴⁵ De Wolfe, above n 19, 215.

⁴⁶ At 948.

entirely clear and led to different interpretations in the *Hedley* case.⁴⁷ Gordon believes that the actual decision in *Nocton v Ashburton* laid down no new law and supplied no authority for making fiduciary relations parallel to contract as a basis for damages for negligent statements. Although he recognizes that Lord Haldane made obiter suggestions that fiduciary relations could found liability for such negligence, he submits that there were no decisions to support that view.⁴⁸

It has been suggested that the Haldane doctrine represents a teutonic graft on the body of the common law. In effect, § 676 of the German civil code establishes that there is no liability for mistaken advice or recommendation apart from contractual relations. Nevertheless, it also establishes some exceptions: when the person giving advice or making a recommendation has expressly or impliedly contracted to take care in doing so or where there is a relation equivalent to contract. This is present in particular in the case of fiduciary relationships which normally exist when there is a permanent business connexion between the parties. There can also be liability in tort for knowingly giving false information or for violating the duties of one's office.⁴⁹

At any rate, and whatever Lord Haldane may have intended, a few years later it was this idea of special relationship, coupled with the concept of assumption of responsibility, which was going to be at the core of all the speeches in the House of Lords in *Hedley Byrne v Heller*.⁵⁰

But, prior to *Hedley Byrne* came the decision of the Court of Appeal in *Candler v Crane, Christmas & Co.*⁵¹ In that case, the plaintiff had responded to an advertisement in a newspaper by a tin mining company seeking further capital. He was prepared to invest £2,000, but before doing so he wished to be satisfied concerning its financial position. The managing director of the company put him in contact with the company's accountants who, knowing for what purpose they were required, showed him the accounts which they had drafted. Unfortunately the accounts had been carelessly prepared, and were grossly defective. Relying on the accounts, the plaintiff invested £2,000 in the company and lost the whole

⁴⁷ Lord Devlin thought that he was intending to limit his references to traditional fiduciary or quasi-fiduciary relationships [1963] 2 All E.R. 575 at p. 606, but Lord Reid could see no logical stopping place. At p. 583.

⁴⁸ D M Gordon, 'Hedley Byrne v Heller in the House of Lords' (1964-1966) 2 *University of British Columbia Law Review*, 113, 119.

⁴⁹ Honoré, above n 13, 296. Viscount Haldane studied in Göttingen and this might explain the similarity between 'fiduciary relationship' as laid down in *Nocton v Lord Ashburton* and the *culpa in contrahendo* doctrine. Cf. von Bar 'Liability for information and opinions causing pure economic loss to third parties: a comparison of English and German case law.' In B S Markesinis (Ed.) *The gradual convergence. Foreign ideas, foreign influences and English law on the eve of the 21st century* (1994) 98, 121.

⁵⁰ Stevens, above n 12, 27.

⁵¹ [1951] 2 K.B. 164, [1951] 1 All E.R. 426 (C.A.).

amount when the company became insolvent. After discovering that the accounts which he had been given provided a completely false picture of the position of the company, indicating a flourishing business instead of one which in truth was on the verge of failure, the plaintiff brought an action against the accountants claiming damages for negligence.

Lloyd-Jacob J. dismissed the action, holding that the accountants were under no duty of care to the plaintiff. The Court of Appeal also rejected, in a divided decision, the plaintiff's claim. Cohen L.J. and Asquith L.J., following *Derry* and *Le Lievre*, held that a false statement carelessly, but not fraudulently, made by one person to another, though acted on by that other to his detriment, was not actionable in the absence of any contractual or fiduciary relationship between the parties. As there was no contract or fiduciary relationship in these circumstances, unlike in *Nocton v Ashburton*, the defendant had no duty of care to the plaintiff on the basis of the existing authority.

Asquith L.J. pointed out that it might not be logical to draw a distinction between negligent acts and negligent words, but that the distinction could be explained by the different histories of the two forms of liability.⁵² He also thought that *Donoghue v Stevenson*⁵³ seemed not to have abolished those differences. Negligent misstatements were still governed by *Derry v Peek* and by *Le Lievre v Gould*.⁵⁴ The proximity test laid down by Lord Atkin in relation to physical harm was not applicable to negligent misstatements. 'Although Lord Atkin's definition of a *neighbour* has been applied outside its limited ambit', he said, 'it has, however, never been applied where the damage complained of was not physical.'⁵⁵ Asquith L.J. argued that had Lord Atkin intended to introduce any changes in the law relating to misrepresentations, he would have not referred to *Le Lievre* with implicit approval.⁵⁶ He finally suggested that the apparent anomaly might be explained on the ground that the damage could be traced more easily in one case than in the other.

⁵² At 195.

⁵³ [1932] AC 562, [1932] All ER 1 (HL).

⁵⁴ Fridman argues that, by affirming *Le Lievre*, the Court of Appeal were returning to a stage in legal thought when confusion about the scope of the tort of negligence still abounded, for *Le Lievre* expressly overruled the only case in which the problem of liability for negligent statements was treated tortiously, without any confusion with contractual liability. This was the decision of Chitty J. in *Cann v Willson* (1888) 3 Ch. 39. Fridman, above n 30, 645.

⁵⁵ *Ibidem*.

⁵⁶ At 189-190. In *Hedley Byrne & Co. v Heller & Partners, Ltd.* [1964 A.C.] Lord Pearce also said that '*Donoghue v Stevenson* was, in fact, dealing with negligent acts causing physical damage, and the opinions cannot be read as if they were dealing with negligence in word causing economic damage. Had it been otherwise some consideration would have been given to problems peculiar to negligence in words.' At 536. Fridman criticises Asquith's L.J. interpretation, submitting that to say that *Donoghue v Stevenson* did not overrule *Le Lievre v Gould* is as pointless as to say that the latter case sustained and confirmed the earlier. Fridman, above n 30, 652.

Seavey argues that if the principle in the *Donoghue* case does not apply to the facts in the *Candler* case, it must be because of the nature of the interest and not the means used to invade it, since in both cases the means which resulted in the harm was the misrepresentation (representing as harmless a beverage which in fact was dangerous). Although admitting that the courts have not given the same protection to purely economic interests as has been afforded to the interest in the physical security of the person or things, Seavey emphasizes that there is no intrinsic reason why the rules should be different and that neither Asquith L.J. nor Cohen L.J. gave a satisfactory explanation. If the explanation is an historical one, he says, there is no reason for a distinction today.⁵⁷

It is also strange that, after Asquith's L.J. insistence on the difference between physical injury and financial loss, he ended up giving the example (purporting to apply it in an economic loss case such as *Candler*) of a marine hydrographer who carelessly omits to indicate on his map the existence of a reef whereby a liner is wrecked. 'Is the unfortunate cartographer', he says, 'to be liable to her owners in negligence for some millions of pounds damages?'⁵⁸

But it was the brilliant dissent by Denning L.J., a 'masterly analysis' requiring little, if any, amplification or modification in the light of later authority, in Lord Bridge's words,⁵⁹ which made the case memorable.

After referring to the 'timorous souls who were fearful of allowing a new cause of action'⁶⁰ and expressing the opinion that 'a country whose administration of justice did not afford redress in a case of the present description would not be in a state of civilization', he argued that there was a duty of care in regard to the representations made by persons such as accountants, surveyors, valuers, and analysts, whose profession and occupation it is to examine books, accounts and other things⁶¹, and to make reports on which other people – other than their clients- rely in the ordinary course of business.⁶² The reason why these

⁵⁷ Seavey, above n 37, 473.

⁵⁸ Fridman asks, *why should that be so?* If a sailor, he says, reasonably acts on a statement (that is, a representation of fact) in a map, and suffers damage because of it, should not the mapmaker (and his employer if any) be held liable in damages? He concludes that it is legally and socially desirable that there should. This would be in line with Denning's L.J. proposition that the duty is owed because those persons are in a profession that requires special knowledge or skill. Fridman, above n 30, 657. With subtle humour, Goodhart comments that it is arguable that, in that sentence, the adjective *unfortunate* might be applied more suitably to the owners of the ship than to the negligent cartographer. A.L. Goodhart, 'Liability to third persons for defective accounts.' (1951) 67 *Law Quarterly Review* 176.

⁵⁹ In *Caparo Industries plc v Dickman*. [1990] 2 AC 605, at 623.

⁶⁰ At 188.

⁶¹ Denning explained (at 180) that professional persons 'are not liable, of course, for casual remarks made in the course of conversation, nor for other statements made outside their work, or not made in their capacity.'

⁶² At 179.

particular persons should be made liable is that they have special knowledge or skill on which others depend. Because of the confidence the public places in them, those people should exercise greater care than the ordinary man in the street. For them, fraud ought not to be the only ground of liability; negligence, too should render them under the obligation to compensate.⁶³

In his speech, Lord Denning made it clear that he did not believe that the duty existed in all circumstances, but that it was restricted to those specific transactions for which the accountants knew that their accounts were required. He said:

I do not think, he said, that the duty can be extended still further so as to include strangers of whom they have heard nothing and to whom their employer without their knowledge may choose to show their accounts. Once the accountants have handed their accounts to their employer they are not, as a rule, responsible for what he does with them without their knowledge or consent...⁶⁴

He next considered the question to whom they were liable:

...They owe the duty, of course, to their employer or client; and also I think to any third person⁶⁵ to whom they themselves show the accounts, or to whom they know⁶⁶ their employer is going to show the accounts, so as to induce him to invest money or to take some other action on them.⁶⁷

It has been submitted that, on this point, the judgment of Denning L.J. was out of step with the law of negligence in regard to things. Elsewhere, the duty of care is owed to those who it is reasonably possible to foresee will be affected by one's negligent act or omission. In that sense, Fridman suggests that the clause 'or to any person who they can reasonably foresee will be shown the accounts so as to be induced to invest money, etc.' should follow. That would enable the wider principle of tort liability to come into play, and would bring negligently made statements in the same category as negligently driven motor cars or cycles, exploding once for all the fallacy of not treating such a statement as a thing as dangerous as a loaded gun or a rickety chair.⁶⁸

⁶³ Fridman, above n 30, 655

⁶⁴ At 179.

⁶⁵ Although Denning L.J. referred to '*any third person*' in the singular, it is clear that the House of Lords in *Caparo* accepted that an auditor may owe a duty of care to a *class* of third parties, if he knows that the client will show them the audited accounts, and that they will rely on them. M Davies, 'The liability of auditors to third parties in negligence.' (1991) 14 *University of New South Wales Law Journal* 177.

⁶⁶ Walker remarks that it is worth observing that the expression '*or ought to know*' is expressly omitted. 'The bold spirits have conquered: *Hedley, Byrne & Co. v. Heller*' (1964-65) 3 *Osgoode Hall Law Journal* 100. Davies points out that the composite phrase 'knew or ought to have known' is often used, but it is not often used with much precision. Sometimes, 'ought to have known' appears to be a simple afterthought, others the whole phrase is used as a synonym of reasonable foreseeability. Davies, *ibid.* 186.

⁶⁷ At 180-181.

⁶⁸ Fridman, above n 30, 656.

2.1.2 Lord Denning's dissent at the House of Lords.

Thirteen years later, in 1964, Lord Denning's L.J. dissent received the strong endorsement of the House of Lords when *Hedley Byrne v Heller and Partners Ltd.*⁶⁹ was decided.

The plaintiffs, Hedley Byrne, were a firm of advertising agents placing orders on behalf of a client, Easipower Ltd. for television and newspaper advertising on terms under which the plaintiffs could be held personally liable for the payment. Becoming concerned about Easipower's credit-worthiness, the plaintiffs instructed their own bankers to look into Easipower's financial position. The plaintiff's bank telephoned the defendants, Easipower's bankers, and subsequently wrote to them asking 'in confidence and without responsibility' whether Easipower were considered trustworthy to the extent of £100,000 per annum. The reply, given with a disclaimer of responsibility, said that the customer was a respectably constituted company, considered to be good for its normal business engagements. Relying on that information the plaintiffs entered into a business transaction with the company which shortly afterwards went into liquidation, causing the claimants substantial financial loss. They brought an action against Hellers for negligence, alleging that, carelessly, a false impression as to the credit of the company had been given.

At the trial Mc Nair J. held that in law no greater duty lay upon the defendants than the general duty of honesty, which was in fact satisfied and therefore the cause was dismissed.

The Court of Appeal concluded that *Hedley, Byrne & Co. v Heller* was indistinguishable from the prior binding authorities of *Le Lievre v Gould* and *Candler v Crane, Christmas* and dismissed the appeal. For the Court, there was no liability for misrepresentation, apart from deceit, contract, fiduciary relations and (perhaps) physical harm.

Honoré, with subtle irony, says that, according to that, you may be liable if you tell lies, break promises, abuse confidence or say that the ice is safe when it is not. If you merely say that a company or an investment is sound, when unknown to you, it is on the point of liquidation or worthless, you are not liable, however careless you may have been.⁷⁰

In the House, although the case was resolved on the basis of the disclaimer of responsibility, it was discussed at length, if there had been no disclaimer of responsibility,

⁶⁹ [1964] A.C. 465, [1963] 2 All E.R. 575 (H.L.)

⁷⁰ Honoré, above n 13, 285.

would Hellers have owed a duty of care to Hedley Byrne? All the Lords unanimously stated that a duty of care could arise outside a contract or fiduciary relationship if the parties were in sufficient proximity. In the words of Lord Hodson,

...apart from fiduciary relationships...there are other circumstances in which the law imposes a duty to be careful, which is not limited to a duty to be careful to avoid personal injury or injury to property but covers a duty to avoid inflicting pecuniary loss.⁷¹

More specifically, Lord Devlin felt that,

There is ample authority to justify your Lordships in saying now that the categories of special relationships, which may give rise to a duty to take care in word as well as in deed, are not limited to contractual relationships or to the relationships of fiduciary duty, but include also relationships which...are equivalent to contract; that is, where there is an assumption of responsibility in circumstances in which, but for the absence of consideration, there would be a contract.⁷²

Lord Devlin was reluctant to go further in offering any guidelines about when or how this *special relationship* might be inferred because he considered that there was in the speech of Lord Shaw in *Nocton v Lord Ashburton* and in the idea of a relationship that is equivalent to contract all that is necessary to cover the situation that arose in the *Hedley* case. Lord Shaw had in turn borrowed the phrase from Sir Roundell Palmer's argument in *Peek v Gurney*⁷³. In spite of its credentials, Gordon questions whether the phrase describes anything that can exist. Consideration, he says, is the very essence of the contract; take away consideration, and what is left? A most bare promise –Hamlet without the prince.⁷⁴ Weir also thought that the concept of '*special relationship*' on which the duty is said to depend, may yet have a great future, but it is a dangerous one in so far as it tempts one to categorisation, to say that, for example, publisher/reader might be a special relationship whereas barrister/client might not. Such categories, he said, are a tolerable means of stating the law, but a very bad way of developing it, as the fateful categories of occupier's liability have surely shown.⁷⁵

Perhaps, because of that conceptual vagueness, there is considerable force in the opinion that the term '*special relationship*' in *Hedley Byrne* was used as 'no more than a label for the circumstances which will give rise to the duty'⁷⁶, or that 'the *special relationship* test turns out to be no real test at all. At best it is merely a conclusory label, and a misleading one at that.'⁷⁷ Ultimately, the special relationship test collapses into either reliance or assumption

⁷¹ [1961] 3 All E.R. 575, 598.

⁷² *Idem* at 610.

⁷³ [1821] L.R. 13 Eq. 29, 97 (Ch).

⁷⁴ Gordon, above n 48, 136.

⁷⁵ Tony Weir, 'Liability for syntax', 21-22 (1963-1964) *Cambridge Law Journal*, 216, 217.

⁷⁶ B Coote, 'The effect of Hedley Byrne' (1966-67) 2 *New Zealand Universities Law Review* 266.

⁷⁷ Feldthusen, above n 2, 37

of responsibility approaches. It does not accurately summarize many of the relevant considerations and it has also produced confusion with the very different ‘fiduciary relationship’. It is inherently vague, provides little or no guidance to commercial parties or litigants, and may be used to justify almost any decision whatsoever.

In any event, Feldthusen recognises that one advantage of describing the duty of care as based on a *special relationship* is that it emphasizes the need for some degree of proximity, some antecedent relationship more circumscribed than one based on foreseeability alone.⁷⁸

Goodhart has pointed out that neither the word *proximity* nor the phrase *special relationship* has any precise meaning. The duty of reasonable care depends on proximity, but on the other hand, as Lord Atkin said in *Donoghue v Stevenson*⁷⁹, proximity is a relationship which means that you must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour.⁸⁰ Goodhart concludes that it is a form of circumlocution to say that reasonable care depends on proximity, and that proximity is a relationship which is based on reasonable care. It disguises the essential point that in every case the question is one fact: has the defendant shown reasonable care in the circumstances? This cannot be answered by the vague word *proximity*. The same circumlocution is found in the phrase *special relationship*. The duty to be careful depends on the special relationship, but the relationship is a special one because it is based on the premise that the circumstances demand special care.⁸¹

Hedley Byrne suggests that the duty would be imposed on a person who, in a ‘business context’⁸² gives information or advice to another who relies on it. Todd submits that a basic requirement is that it is reasonable for the plaintiff to rely on what the defendant says.⁸³ It will not be reasonable for the plaintiff to rely on the defendant’s statement unless it was made on a ‘serious occasion’.⁸⁴ Accordingly, a statement made on a social or an informal

⁷⁸ *Idem*, 40.

⁷⁹ [1932] AC 562, [1932] All ER 1 (HL).

⁸⁰ [1932] A.C. at 580.

⁸¹ Goodhart, above n 16, 298.

⁸² Per Lord Reid at 812. Weir, one of the critics of *Hedley Byrne*, adds that the information or advice must be given not just ‘in a business context’ but in the context of the defendant’s business. You must do properly anything you are paid to do, even if it is not your job; if what you do is part of your job, you must do it properly even if you are not paid; but if you accede to a request to do something for which is not part of your job, you are not liable for doing it improperly. Tony Weir, ‘The developer and the clerk’ 2 (1982) *Oxford Journal of Legal Studies* 440, 441.

⁸³ Todd, above n 4, 205.

⁸⁴ Peter Cane, ‘The metes and bounds of *Hedley Byrne*’ (1981) 55 *Australian LawJournal*, 870.

occasion is unlikely to be actionable.⁸⁵ In that sense, a case that has been called aberrant is *Chaudry v Prabbhakar*⁸⁶ where a friend who advised on the purchase of a car was held liable, although he was not an expert mechanic nor was in the used-car business.⁸⁷ The authorities appear to be clear that there is no liability for *kerbstone comment* given at a social gathering. The law seems also to be unlikely to impose liability upon a bystander who, when asked for directions, carelessly misdirects the inquirer on his way, even if the latter thereby misses some important appointment.⁸⁸

In his speech, Lord Pearce referred to a business transaction whose nature makes clear the gravity of the inquiry and the importance and influence attached to the answer.⁸⁹ Coote suggests that this is going back to the question whether the circumstances were such that the representor could be taken to be assuming responsibility for his answer.⁹⁰

Lord Denning said that

A scientist or expert is not liable to his readers for careless statements in his published works for he publishes simply for the purpose of giving information and not with any transaction in mind at all.⁹¹

Honoré submits that no one suggests that a duty to take care in giving information or advice rests on one whose opinion is asked on a social occasion. Some people who are hard up try to save money and trouble by buttonholing a doctor at a cocktail party and asking him how to cure his asthma. If the doctor's natural courtesy impels him to reply and his words can be discerned above the babble or through the alcoholic haze, he can hardly, apart from deceit, be held legally responsible.⁹²

Gordon remarks that sometimes the situation could be dubious in cases where discussions are partly social, but involve business too. It is common, he says, for many people to insist on mixing the two, when, for business reasons, maintain social contacts that they dislike, and they will make the most of them.⁹³

Lord Reid said:

A reasonable man, knowing that he was being trusted or that his skill and judgment were being relied on, would, I think, have three courses open to him. He could keep silent or decline to give the information or advice sought: or he could give an answer with a clear qualification that he accepted no

⁸⁵ Todd, above n 4, 200.

⁸⁶ [1989] 1 W.L.R. 29.

⁸⁷ John Hodgson, 'Hedley Byrne - A new sacred cow?' 4 (1995) *Nottingham Law Journal*, 1, 12. Cane also agrees that this case may rest on an unjustified concession. Peter Cane, *Tort Law and economic interests*. (1991) 183.

⁸⁸ *J Charlesworth & R A Percy on Negligence*, 11th ed (2006) 97.

⁸⁹ At 539.

⁹⁰ Coote, above n 76, 271.

⁹¹ At 434.

⁹² Honoré, above n 13, 286.

⁹³ Gordon, above n 48, 145.

responsibility for it or that it was given without that reflection or inquiry which a careful answer would require: or he could simply answer without any such qualification. If he chooses to adopt the last course he must, I think, be held to have accepted some responsibility for his answer being given carefully, or to have accepted a relationship with the inquirer which requires him to exercise such care as the circumstances require.⁹⁴

It could be asked why, in a case such as *Hedley*, if the advice was gratuitous and, so there was no duty to give it at all, how could there be a duty not to give it negligently. The question is that while the law may favour the Good Samaritan, it can hardly exempt him from a duty of care when, having undertaken the task⁹⁵, he makes matters worse, and in many cases of careless misrepresentation the plaintiff will reasonably rely upon the defendant and thus *not* get alternative advice from elsewhere.⁹⁶

In considering the proximity of relationship required, Lord Devlin said:

I shall therefore content myself with the proposition that wherever there is a relationship equivalent to contract, there is a duty of care. Such a relationship may be either general or particular. Examples of a general relationship are those of solicitor and client and of banker and customer. For the former *Nocton v Lord Ashburton* has long stood as the authority and for the latter there is the decision of Salmon J. in *Woods v Martins Bank Ltd.*, which I respectfully approve. There may well be others yet to be established. Where there is a general relationship of this sort, it is unnecessary to do more than prove its existence and the duty follows. Whereas in the present case what is relied on is a particular relationship created ad hoc, it will be necessary to examine the particular facts to see whether there is an express or implied undertaking of responsibility. I regard this proposition as an application of the general conception of proximity. Cases may arise in the future in which a new and wider proposition, quite independent of any notion of contract, will be needed.⁹⁷

As can be seen, Lord Devlin offered only two examples of a general relationship automatically giving rise to an assumption of responsibility: solicitor and client, and banker and customer. Stevens suggests that from the authorities cited to support these, it looks probable that they are limited to cases where there was in fact a contract or the parties were in the process of making a contract. *Nocton* was an action by a client against his solicitor, but not having been pleaded in contract, and fraud not having been proved, the court resorted to the doctrine of fiduciary relationship in order to hold the defendant liable. In *Woods v Martins Bank*, it was held that a bank manager was liable to a potential customer of a bank

⁹⁴ At 583.

⁹⁵ In an article published in 1947, Paton, with incredible prescience, said: 'it would be in keeping with the spirit and history of the common law at least to impose liability on those who in the course of business give gratuitous advice. There is no duty to act gratuitously but if the defendant takes the task upon himself why should an action not lie.' 'Liability in Tort for negligent statements' 25 (1947) *Canadian Bar Review*, 123, 138.

⁹⁶ J M Evans, 'A mirage in the wilderness: Hedley Byrne considered'. (1971) 34 *Modern Law Review* 333.

⁹⁷ At 530.

for the negligent advice he gave before the account was opened. Again, the apparent basis of the decision was a fiduciary relationship.⁹⁸

It has been submitted that this approach, however, would create some difficulties. In effect, the term *special relationship* suggests there are particular relationships (buyer-seller, buyer-broker, civil servant-citizen, for example) which can be identified in advance as special relationships. Under this approach, one party would always owe a duty of care to the other in a special relationship. Thus, once an appellate court has decided, for example, that a real estate broker owed a duty of care to a prospective home buyer, that relationship would have been identified as *special*. In subsequent cases all the lower courts would have to do is identify the relationship by precedent, and recognize a duty regardless of the other circumstances. Yet, *Hedley Byrne* itself cannot be so explained. If banker-client were a special relationship, that relationship would not vary with disclamatory language, although liability might.⁹⁹

Stevens agrees that even when it has been established that a special relationship could exist between the plaintiff and the defendant, this does not automatically ensure that a duty of care is owed.¹⁰⁰ In fact, this was much in issue in *Hedley Byrne*.

Lord Reid concluded that in circumstances such as those, a banker in the position of Hellers, owed not only a duty to be honest, but also a duty of care.¹⁰¹ Stevens submits that it is difficult to see that a duty to be honest is any more than a duty not to be deceitful, which was, after all, established in *Derry v Peek*.¹⁰² Honoré suggested that the House of Lords has created a new duty of honesty quite different from that required by the tort of deceit as defined in *Derry v Peek*.¹⁰³

Lord Morris, on the other hand, emphasized that this was casual rather than deliberate advice, and concluded that there was much to be said for the view that if a banker gives a reference in the form of a brief expression of opinion in regard to creditworthiness he does not accept, and there is not expected of him, any higher duty than that of giving an honest answer.¹⁰⁴

Lords Morris and Pearce chose to put emphasis on the liability of persons exercising some special skill or judgment. Both of them cite with approval the *dictum* of Lord

⁹⁸ Stevens, above n 12, 143.

⁹⁹ Feldthusen, above n 2, 41.

¹⁰⁰ Stevens, above n 12, 145.

¹⁰¹ At 157.

¹⁰² Stevens, above n 12, 146.

¹⁰³ Honoré, above n 13, 291.

¹⁰⁴ At At 594.

Loughborough in *Shiells v Blackburne*¹⁰⁵ that if a man gratuitously undertakes to do a thing to the best of his skill, where his situation or profession is such as to imply skill, an omission of that skill is imputable to him as gross negligence.

Lord Morris, in particular, following the guidance given by Lord Haldane in *Nocton*¹⁰⁶ and repeated in *Robinson v National Bank of Scotland*¹⁰⁷ said that:

...it should now be regarded as settled that if someone possessed of a special skill undertakes, quite irrespective of contract, to apply that skill for the assistance of another person who relies on such skill, a duty of care will arise. The fact that the service is to be given by means of, or by the instrumentality of, words can make no difference. Furthermore if, in a sphere in which a person is so placed that others could reasonably rely on his judgment or his skill or on his ability to make careful inquiry, a person takes it on himself to give information or advice to, or allows his information or advice to be passed on to, another person who, as he knows or should know, will place reliance on it, then the duty of care will arise.¹⁰⁸

With similar expressions, Lord Pearce said:

If persons holding themselves out in a calling or profession take on a task within that profession they have a duty of skill and care. In terms of proximity one might say they are in particular close proximity to those who they know are relying on their skill and care although the proximity is not contractual.¹⁰⁹

2.1.3 Voluntary assumption of responsibility

At the present, it looks like the most considerable body of judicial and academic opinion agrees that one of the key elements to the recognition of the duty of care is the *voluntary assumption of responsibility*.

The concept, however, has been subject to sustained critical analysis by academic commentators.¹¹⁰ One of the strongest is probably Kit Barker who has pointed out that one of the difficulties is that judges often use the same or similar language to give expression to

¹⁰⁵ [1789] 1 Hy. Bl. 158, 162.

¹⁰⁶ 'Although liability in negligence in word has in material respects been developed in law differently from liability for negligence in act, it is nonetheless true that a man may come under a special duty to exercise care in giving information or advice... Whether such a duty has been assumed must depend on the relationship of the parties, and it is at least certain that there are a good many cases in which that relationship may be properly treated as giving rise to a special duty of care in statement.' [1914] A.C. 932, 948.

¹⁰⁷ 'I think, as I said in *Nocton's* case, that an exaggerated view was taken by a good many people of the scope of the decision in *Derry v Peek*. The whole doctrine as to fiduciary relationships, as to the duty of care arising from implied as well as express contracts, as to the duty of care arising from other special relationships which the court may find to exist in particular cases, still remains...' [1916] S.C. (H.L.) 154.

¹⁰⁸ At 594.

¹⁰⁹ At 616.

¹¹⁰ Janet O'Sullivan. 'Negligence liability of auditors to third parties and the role of assumption of responsibility'. (1998) 14 *Professional Negligence*, 195, 196. It also fell out of favour in *Ministry of Housing and Local Government v Sharp* [1970] 2 QB 223, ... 'the duty to use due care in a statement arises, not from any voluntary assumption of responsibility, but from the fact that the person making it knows, or ought to know, that others, being his neighbours in this regard, would act on the faith of the statement being accurate'. Per Lord Denning MR at 238.

what are different ideas. Sometimes, they mean that the defendant has impliedly *promised the plaintiff that he will take care* in his conduct; sometimes that the defendant has exercised a degree of *choice* of some kind; and sometimes the phrase has also been interpreted to mean no more than the defendant has *voluntarily 'acted'*.¹¹¹

An additional difficulty is the fact that the concept often appears in tandem or in association with the concept of reliance. This complicates the determination whether the ideas are important individually or only when they are combined. Are voluntary assumptions only significant when they are relied upon, or on the contrary, is reliance only relevant when it is a response to a voluntary assumption?¹¹²

Barker has identified three completely different models of liability which he describes as the model of *promise*, *choice* and *voluntary action*. On the first model, the defendant makes an implied promise of care to the plaintiff. A clear example of this model is the speech of Lord Devlin in *Byrne* where he refers to an assumption of responsibility in circumstances in which, but for the absence of consideration, there would be a contract.¹¹³

Whittaker suggests that an 'assumption of responsibility' is peculiarly inappropriate for serving as a basis for the imposition of a duty in tort.¹¹⁴ In fact, a model of negligence based upon promises is strange to common lawyers because it blurs the sharp division of functions as between the law of contract and the law of torts which they are used to assume.¹¹⁵ It has also been pointed out that this model seems to focus more on the subjective defendant's intentions and duties in tort are *imposed* as a matter of law. Assumed duties are the province of contract.¹¹⁶ Coote illustrates the situation saying that a person driving a motor car along a road is subject thereby to a duty of care to other road users and to adjoining owners and occupiers. But while it is true that the driver has a choice whether to drive the car or not, it is not for him to decide whether he assumes those various duties of care. They are duties imposed by law on any driver of a motor car.¹¹⁷

Another aspect that has been remarked is that promises cease to provide a viable explanation of negligence liability as soon as duties of care are extended to relations in which there has been no direct communication or dealing between the parties or their respective

¹¹¹ K Barker, 'Unreliable assumption in negligence'. (1993) 109 *Law Quarterly Review* 462.

¹¹² Ibid.

¹¹³ At 528.

¹¹⁴ S Whittaker, 'The application of the 'broad principle of Hedley Byrne' as between parties to a contract.' (1997) 17 *Legal Studies* 175.

¹¹⁵ Barker, above n 111, 464.

¹¹⁶ Todd, above n 4, 227.

¹¹⁷ Coote, above n 76, 269.

agents. In effect, existing contractual principles do not imply promises between parties who have never directly communicated or dealt.¹¹⁸

In *Smith v Eric S. Bush*¹¹⁹ the plaintiff sued a firm of surveyors in respect of a negligent house valuation report which the firm had prepared on the instructions of the building society which was proposing to grant a mortgage to the plaintiff to finance his purchase of the house. He had paid a valuation fee to the building society and was provided with a copy of the report by the society. Relying on the report, he purchased the house and subsequently discovered that because the report had not identified a defect in the house he was put to extra expense. It was held that a person may still be liable under *Hedley Byrne* despite having expressly disclaimed liability for negligence

Lord Griffiths said that the voluntary assumption of responsibility is not a helpful or realistic test of liability and remarked the obvious fact that it is extremely unlikely that an express assumption of responsibility will ever occur. He recognized that a finding of an assumption of responsibility will often be based on a fiction and pointed out that the notion will refer to those circumstances in which the law will deem the maker of a statement to have assumed responsibility for his work.¹²⁰ In his opinion, the assumption of responsibility can be seen to be a fiction which expresses a conclusion that a duty of care is to be imposed. It is not a test which can be used to reach that conclusion and it says nothing about the circumstances which lead to the conclusion. In other words, it is totally unhelpful.

Stanton notes the particular context in which the discussion in *Smith v Eric S. Bush* had occurred: the supposed voluntary nature of the duty recognized by *Hedley Byrne* had been argued to mean that an explicit denial of responsibility in the form of a disclaimer resulted not in the availability of a defence, but in there being no duty of care and thus no need for a defense. Besides, counsel said, the provisions of the Unfair Contract Terms Act 1977 were directed to the control of defences and were irrelevant to cases in which no duty existed.¹²¹

Also Lord Roskill confessed his difficulties with the notion of voluntary assumption of responsibility. He declared that he could only understand it if it meant no more than the

¹¹⁸ Barker, above n 111, 469.

¹¹⁹ [1990] 1 AC 831.

¹²⁰ In *Caparo v Dickman* also most of their Lordships seem to have accepted that the notion of a voluntary undertaking of responsibility was only used to express the court's view that the imposition of liability was justified on the facts of the case. In other words, the undertaking of responsibility was usually implied, not express; and implied undertakings are really imposed undertakings, just as implied contractual warranties are often, in effect, imposed warranties. Cane, above n 84, 476.

¹²¹ K M Stanton, 'Professional negligence in Tort: the search for a theory' in P Birks (ed), *Wrongs and remedies in the twenty-first century* (1996) p. 76.

existence of circumstances in which the law would impose a liability on a person making the allegedly negligent statement to the person to whom that statement is made. But, in that case, he recognized the concept did not help to determine in what circumstances the law will impose that liability or its scope.¹²²

In the 1990's, Lord Goff, through his speeches in three cases gave the notion of voluntary assumption of responsibility a renewed centre-stage role.

In *Spring v Guardian Assurance plc*¹²³, he said that the source of the duty of care owed by the writer to the subject of a reference lay in the principle derived from *Hedley Byrne v Heller*, viz. an assumption of responsibility by the defendants to the plaintiff in respect of the reference, and reliance by the plaintiff upon the exercise by them of due care and skill in respect of its preparation.¹²⁴ He also quoted Lord Devlin in *Hedley Byrne* when he said that the essence of the matter was the acceptance of responsibility.¹²⁵ It has been submitted that the introduction of the concept may seem out of place in *Spring* since neither the arguments of counsel nor the judgments of the lower courts referred to it.¹²⁶ Accordingly, Lord Goff said that his speech had to be regarded as being of limited authority.¹²⁷

It has also been pointed out that, in one sense, *Spring* was the wrong case in which to attempt a revival of the concept of 'assumption of responsibility' since the assumption of responsibility in that case was not voluntary but arose out from a statutory obligation.¹²⁸

In *Henderson v Merrett Syndicates Ltd.*¹²⁹ Lord Goff referred to the criticism of Lords Griffiths and Roskill who considered the concept of 'assumption of responsibility' as being 'unlikely to be a helpful or realistic test in most cases'. Lord Goff said that in most cases concerned with liability under the *Hedley Byrne* principle in respect of negligent misstatements, the question that frequently arose was whether the plaintiff fell within the category of persons to whom the maker of the statement owed a duty of care and therefore, the problem of containing the extent of the duty of care within reasonable bounds was at issue, but where such difficulty did not exist, there was no reason why recourse should not be

¹²² *Caparo Industries plc v Dickman* [1990] 2 AC 605.

¹²³ [1995] 2 AC 296.

¹²⁴ At 316.

¹²⁵ At 318.

¹²⁶ T Allen, 'Liability for references: The House of Lords and *Spring v Guardian Assurance*' (1995) 58 *Modern Law Review* 557.

¹²⁷ At 367.

¹²⁸ D Howarth, 'Economic loss in England' in E Banakas (ed), *Civil liability for pure economic* (1996) 38. In fact, under the Life Assurance and Unit Trust Regulatory Organization rules, the new firm was required to seek a reference and the defendant was required to supply one.

¹²⁹ [1995] 2 AC 145.

had to the concept, in particular, considering that it had been adopted, in one form or another, by all of their Lordships in *Hedley Byrne*.

He then expressed his conviction that if a person assumed responsibility to another in respect of certain services, there was no reason why he should not be liable in damages to that other in respect of economic loss which flows from the negligent performance of those services.¹³⁰

In a caustic comment, Stanton remarks that this is equivalent to saying that we are to use a concept which is recognized as being unhelpful in difficult cases.¹³¹

On the same line of criticism, Bernstein says that it would seem that Lord Goff is suggesting that, for the purposes of the application of the principle of voluntary assumption of responsibility, a distinction should be drawn between cases in which there is a real concern as to the indeterminacy of the possible members of the class of potential plaintiffs (where the concept would be of small assistance) and cases where that concern does not exist (where the notion would be of great assistance). If, in fact, he did intend to draw this distinction, Bernstein submits that it is surprising that Lord Goff went to so much trouble to formulate a principle which was expressly stated by him to be of limited application, had the clear potential to cause confusion in future cases and was completely unnecessary because the *Caparo* approach was a perfectly adequate tool for analyzing the three decisions in *Henderson, Spring* and *White v Jones*.¹³²

In any event, in *White v Jones*¹³³, Lord Goff insisted on the notion of assumption of responsibility as a principle, rather than a conclusion reached by applying other principles, but this time extending *Hedley Byrne* to apply to negligence by the testator's solicitor towards an intended beneficiary. In effect, after recognizing the difficulties in holding, on ordinary principles, that a solicitor assumes any responsibility towards an intended beneficiary under a will which he has undertaken to prepare on behalf of his client, he concluded that an extension of the ordinary principle in *Hedley Byrne* should be made for the special circumstances of the case.¹³⁴

In *Commissioners of Customs & Excise v Barclays Bank plc* (fully discussed later at p. 224) the House of Lords considered again the possibility of 'voluntary assumption of

¹³⁰ At 180.

¹³¹ Stanton, above n 121, 77.

¹³² Bernstein, above n 23, 117.

¹³³ [1995] 2 AC 207.

¹³⁴ At 268.

responsibility' as a test. From that case, it is apparent that it is no more than a label; probably a helpful channelling for judicial thought, but of little value as a test in itself.

2.1.4 The choice model.

The 'choice model' finds its best example in Lord Reid's speech in *Hedley Byrne* where, after referring to the freedom to act of a person (the advisor in the particular case), he said that if he chooses to act, he must be held to have accepted some responsibility for his answer being given carefully, or to have accepted a relationship with the inquirer which requires him to exercise such care as the circumstances demand.¹³⁵

In this case, it has been submitted the expression means no more than the defendant's actions were voluntary and that he was conscious of them, but in others, it means that the defendant has not just chosen to act, but has chosen a legal obligation or duty.¹³⁶ There is also a composite version of this model where the defendant chooses to induce a reliance relationship through his words or actions. A good example is Lord Bridge's speech in *Caparo* where he said:

...the defendant knew that his statement would be communicated to the plaintiff, either as an individual or as a member of an identifiable class, specifically in connection with a particular transaction or transactions of a particular kind...and that the defendant would be very likely to rely on it for the purposes of deciding whether or not enter on that transaction or on a transaction of that kind.¹³⁷

2.1.5 The voluntary action model.

On this model liability is imposed, not because the defendant has promised or chosen anything, but simply because he has acted in circumstances in which he was free from internal incapacities, or illegitimate external constraints.¹³⁸ According to Barker, this is the weakest model, so weak that it is openly admitted that the assumption of responsibility is deemed, not real. He also points out that if a voluntary action is deemed, and consists in no more than voluntary conduct, it is quite clearly a fiction. For that reason he concludes that to continue to refer to the concept whilst diluting its meaning is no solution and suggests that it would be better to stop talking about voluntary assumptions altogether.¹³⁹

A good example of this model appears in Lord Oliver's speech in *Caparo*:

¹³⁵ At 583.

¹³⁶ Barker, above n 111, 470.

¹³⁷ At 620.

¹³⁸ Barker, above n 111, 474.

¹³⁹ Ibid.

Voluntary assumption of responsibility is a convenient phrase but it is clear that it was not intended to be a test for the existence of the duty for, on analysis, it means no more than that the act of the defendant in making the statement or tendering the advice was voluntary and that the law attributes to it an assumption of responsibility if the statement or advice is inaccurate and is acted upon. It tells us nothing about the circumstances from which such attribution arises.¹⁴⁰

2.1.6 Reliance.

Another concept that has sometimes been considered as the touchstone of liability under the *Hedley Byrne* principle is reliance. Some of the speeches in that case seem to indicate that this was in fact the basis of the defendant's duty of care. Lord Reid, for instance, referred to the responsible man who knows that he is going to be trusted, or that his skill and judgment is being relied on.¹⁴¹ Lord Morris explained how a duty of care would arise when a person who possesses a special skill applies it for the assistance of another who relies upon such skill¹⁴² and the idea was repeated by Lord Hodson:

If, in a sphere in which a person is so placed that others could reasonably rely upon his judgment or his skill or upon his ability to make careful enquiry, a person takes it upon himself to give information or advice to, or allows his information or advice to be passed on to another person who, as he knows, or should know, will place reliance upon it, a duty of care will arise.¹⁴³

There is no need to show that the representor actually intended the representee to rely, as long as it would be reasonable for him to rely in the circumstances, but it is necessary for the representee to show that he was aware of the statement and actually relied on it.

However, there have also been some doubts in relation to the role of reliance. Again, this is a term which is capable of more than one meaning and the courts have commonly failed to define the sense in which they are using it.¹⁴⁴ *White v Jones*¹⁴⁵, the leading case for disappointed beneficiaries, for instance is a clear example indicating that it is not necessary that the plaintiff rely on the defendant to exercise care. On the contrary, in *Spring*, Lord Goff stated that reliance is essential. It has been submitted that he may have meant only that reliance or trust could provide evidence that there was a voluntary assumption of responsibility¹⁴⁶ or that he was using the term in a broad sense to indicate little more than an

¹⁴⁰ At 637.

¹⁴¹ At 486.

¹⁴² At 502.

¹⁴³ At 503. Lord Devlin was the only member of the house who did not require that reliance should occur and this was probably because of his stated policy of not defining the principle too closely for fear of stunting its growth. Coote, above n 23, 269.

¹⁴⁴ Stanton, above n 121, 79.

¹⁴⁵ [1995] 2 WLR 187.

¹⁴⁶ Allen, above n 126, 558.

assumption that the other person will perform a task carefully.¹⁴⁷ If there is any reliance at all, it certainly is different from the typical situation where the plaintiff actually relies on the statement. In *Spring*, it might be simply preferable to describe the plaintiff as reasonably depending on his employer to take care in giving the reference.

Looking for some consistency it has been said that where the claim is based on negligent misstatement, it is likely that the causative mechanism will be reliance. Where the negligence consists of a negligent act or omission, the necessary causative link may be established without reliance.¹⁴⁸

Cane argues that the reason why reliance figures so largely in the formulations of the duty principle in *Hedley* even if it is not important as a legal limitation of liability is because the notion of reasonableness is tacked on to reliance –the reliance must be reasonable and reasonably foreseeable by the defendant. Reasonableness in this context may be seen as a conclusory term embracing all the factors which go together to justify the imposition of liability on a defendant whose advice was relied upon to the detriment of the plaintiff.¹⁴⁹

In any event, after *White v Jones* the probability of reliance being used as a useful test for the recognition of a duty of care in misstatement cases seems to have been inevitably reduced.

An additional difficulty of all these tests is that they still require a policy determination as to what should be the scope of liability. Lord Pearce acknowledged this when he stated:

How wide the sphere of the duty of care in negligence is to be laid depends ultimately upon the court's assessment of the demands of society for protection from the careless of others.¹⁵⁰

2.1.7 The requirement of special skill or knowledge.

In general, liability for negligent misstatements affects mainly those who are in the business of giving information or advice. The question is whether it should be restricted to such kind of defendants.¹⁵¹

Lord Denning, in his dissent in *Candler v Crane Christmas and Co*¹⁵², stated that the persons subject to a duty of care in giving information or advice included 'those analysts,

¹⁴⁷ Stanton, above n 121, 79.

¹⁴⁸ John L Powell and Rupert Jackson, *Professional Liability* (5th ed, 2002) p. 1279.

¹⁴⁹ Peter Cane, 'The metes and bounds of Hedley Byrne' (1981) 55 *Australian LawJournal* 864.

¹⁵⁰ At 536.

¹⁵¹ Martin Davies, 'Special skill in negligent misstatement' (1989-90) 17 *Melbourne University Law Review*, 484.

whose profession and occupation it is to examine books, accounts and other things.’¹⁵³ By this view, a duty of care could only arise where it is part of the business of the person to give advice.¹⁵⁴

In *Hedley Byrne v Heller*, Lords Hodson, Morris and Pearce seem to approach the subject not in terms of professions in the narrowest sense of learned professions, but at least in terms of the profession of special skill or competence. Lord Reid, on the contrary, ascribed the obligation to any reasonable man who knows he is being trusted or that his skill and judgment are being relied on. Lord Devlin did not limit the liability to persons professing skill either. He spoke, in fact, of professional relations as raising a general presumption of responsibility for statements and advice, but he did not exclude the possibility of *ad hoc* relationships giving rise to responsibility in particular cases. According to this, it has been suggested that so far as the House of Lords is concerned, authority was evenly balanced so that the judges in later cases would have a choice.¹⁵⁵

Fridman regrets the fact that another senior and important judicial body, the Judicial Committee of the Privy Council, a few years after the House of Lords showed clear signs of willing to extend and enlarge the scope of the law of negligence, appears to have repented of the earlier liberalization of the law and to have retreated somewhat from the position occupied by the House of Lords in the *Hedley Byrne* case.¹⁵⁶

He was referring to the case of *Mutual Life & Citizens’ Assurance Co. v Evatt*.¹⁵⁷ In that case, the Privy Council held that *special skill* was a requirement for the existence of a duty of care in making statements.

The issue was decided by a bare majority of the Privy Council on a demurrer dismissed by both the Supreme Court of New South Wales and the High Court of Australia. The plaintiff’s allegations were that he had sought investment advice from an insurance company which was a co-subsiary of another company (H.G. Palmer Ltd.) where he intended to invest. The insurance company negligently advised that its co-subsiary was a sound investment, which it was not. Acting on that advice, Mr. Evatt invested and lost his money.

In the High Court, the majority had held that it was not important that the defendant was not in the business of giving investment advice. Barwick C.J. said:

¹⁵² [1951] 2 KB 164.

¹⁵³ At 179.

¹⁵⁴ Barbara Ann Hocking, *Liability for negligent words* (1999) 73.

¹⁵⁵ Coote, above n 76, 268.

¹⁵⁶ Fridman, above n 30, 8.

¹⁵⁷ [1971] A.C. 793.

In my opinion, the elements of the special relationship to which I have referred do not require either the actual possession of skill or judgment on the part of the speaker or any profession by him to possess the same. His willingness to proffer the information or advice in the relationship which I have described is, in my opinion, sufficient.¹⁵⁸

In the Privy Council, the majority took an opposite view, holding that the negligent gratuitous giver of advice or information could only be subject to a duty of care where the advice was both given ‘in the ordinary course of the adviser’s business or profession’ and was of the kind which required some special skill which the recipient of the advice knew the adviser claimed to have because he engaged in that business or profession, or where the advice was given with an *undertaking* to take such special care.

Lord Diplock, giving the opinion of the majority, said that in *Hedley* the reference and discussion of ‘such care as the circumstances require’ presupposed

...an ascertainable standard of skill, competence and diligence with which the advisor is acquainted or had represented that he is. Unless he carries on the business or profession of giving advice of that kind he cannot be reasonably expected to know whether any and if so what degree of skill, competence or diligence is called for, and a fortiori...he cannot be reasonably held to have accepted the responsibility of conforming to a standard of skill, competence or diligence of which he is unaware, simply because he answers the enquiry with knowledge that the advisee intends to rely on his answer.¹⁵⁹

It should be noted that the majority do not go so far as to hold that the adviser must possess some special qualification or be a member of some calling or profession. It is sufficient if he claims or holds himself out to have skill or competence in the subject matter of the advice, but the holding out must relate to some recognized kind of business in which advice of the kind is given.¹⁶⁰ Lindgren agrees and says that apart from authority, one would have thought that a profession of skill and qualification would have been relevant only to such matters as the reasonableness of the adviser’s reliance and the issue of the degree of skill which an adviser would have to show once it was decided that he was subject to a duty of care at all. But one would not have thought ‘professionalism’ a prerequisite of the existence of the ‘special relationship’ which implies a duty of care.¹⁶¹

Two passages in *Hedley Byrne* from the speeches of Lord Reid and Lord Morris seemed to express that where a person is so placed that a reasonable man might expect his advice to be reliable if carefully given, any advice offered in a serious context must be carefully given. The majority interpreted these words to mean that both Lord Reid and Lord

¹⁵⁸ At 574.

¹⁵⁹ At 159.

¹⁶⁰ Peter McKenzie, ‘Whatever happened to Hedley Byrne’ (1974) *New Zealand Law Journal*, 543, 544.

¹⁶¹ K.E. Lindgren, ‘Professional negligence in words and the Privy Council’ (1972) 46 *Australian Law Journal*, 176, 181.

Morris, despite the language they had used, really intended that the existence of a duty of care should be restricted to people who carried on the business of giving advice or normally undertook to give advice of a certain kind.

It has been submitted that, in suggesting how the dicta of Lords Reid and Morris should be read, the majority were giving effect to the adage that one's words do not mean what one says they mean, they mean what someone else says they mean.¹⁶² Steven's irony is related to the fact that Lord Reid and Lord Morris actually formed the minority in the *Evatt* case. In a powerful article, Glasbeek qualifies as astounding the fact that judges can actually tell their fellow members of a bench what they meant by certain statements.¹⁶³

Lord Reid and Lord Morris felt necessary to reply that they were 'unable to construe the passage from our speeches cited in the judgment of the majority in the way in which they are there construed.'

The skill principle has been criticized as being too narrow and inflexible. The minority lamented that the majority abandoned a flexible approach saying that:

In our judgment it is not possible to lay down hard-and-fast rules as to when a duty of care arises in this or in any other class of case where negligence is alleged. When in the past, judges have attempted to lay down rigid rules or classifications or categories they have later had to be abandoned.¹⁶⁴

Lords Reid and Morris considered it unnecessary and undesirable to limit the scope of the duty in the way proposed by the majority and felt that the duty of care should normally arise where advice is given on business occasion or in the course of business activities.

This 'course of business principle' has been used in subsequent English cases to reject the special skill requirement and to establish, instead, that although the advice need not have been given by professional adviser, it must at least have been given in a business context.¹⁶⁵

Cane suggests that even to restrict liability to business contexts is to close the categories of duty at a point short of where the minority in *Evatt* would, since the spirit of their judgment seems to be that a duty of care might arise in any situation where advice is given and relied upon, provided the reliance was reasonable. The case of a businessman giving advice in the course of his business would be but an application of this principle.¹⁶⁶

¹⁶² L L Stevens, 'Two steps forward and three back! Liability for negligent words.' 5 (1972-73) *New Zealand Universities Law Review*, 39, 43.

¹⁶³ Harry Jacques J Glasbeek, 'Negligent misstatements in the Privy Council – Area of liability clearly delimited' 50 (1972) *Canadian Bar Review*, 128, 133.

¹⁶⁴ At 810.

¹⁶⁵ *Esso Petroleum Co. Ltd. v Mardon* [1976] Q.B. 801.

¹⁶⁶ Cane, above n 149, 865.

It has been argued that there seems to be nothing incongruous about fixing a man who is in a position of knowledge with a duty to be as careful about giving advice in respect of that knowledge as a reasonable man in that situation could be expected to be. It should not matter whether the advice was given as part of the everyday business practice of the adviser.¹⁶⁷ The minority expressed this idea, stating that:

It must be borne in mind that there is here no question of warranty. If the adviser were to be held liable because his advice was bad then it would be relevant to inquire into his capacity to give the advice. But here and in cases coming within the principles laid down in *Hedley Byrne* the only duty in question is a duty to take reasonable care before giving the advice. We can see no ground for the distinction that a special skilled man must exercise care but a less skilled man need not do so. We are unable to accept the argument that a duty to take care is the same as a duty to conform to a particular standard of skill. One must assume a reasonable man who has that degree of knowledge and skill which facts known to the inquirer (including statements made by the adviser) entitled him to expect of the adviser, and then inquire whether such a reasonable man could have given the advice which was in fact given if he had exercised reasonable care.

Liability may attach to the giving of opinions, advice or information. In fact, advice is usually based on information and the Privy Council held in *Evatt* that information-gathering by the adviser from sources other than the advisee was subject to the skill principle in the same way as the advice itself.¹⁶⁸

It has been submitted that it is fairly clear that the ratio decidendi of the majority is unsound: there is no reason in law why only those who claim skill need take care, and it is not true in fact that carelessness can only be detected where skill is usually deployed.¹⁶⁹ To limit the duty of care to those occasions where advice is not only given as part of a business, but also to those where special skill is needed to formulate it, is to excessively and unnecessarily restrict the duty of care owed in the giving of advice.¹⁷⁰ Nor is it justifiable in principle: enough other relevant factors may be present in any one case to lead a court unavoidably to the conclusion that a reasonable man in that situation would assume responsibility for the resulting loss.¹⁷¹

Many courts free from this case as authority felt that the minority judgment contained a more useful and flexible formulation of the assumed responsibility principle.

¹⁶⁷ Glasbeek, above n 163, 131.

¹⁶⁸ At 803.

¹⁶⁹ Weir, above n 82, 440.

¹⁷⁰ S J Mills, 'Experts and expert advice – The quagmire of *M.L.C. v Evatt*' 2 (1976) *Recent Law*, 281, 287.

¹⁷¹ Christopher Harvey, 'Economic losses and negligence. The search for a just solution.', 50 (1972) *Canadian Bar Review*, 580, 609.

In Australia, in *L. Shaddock & Associates Pty. Ltd. v Council of the City of Parramatta (Nº1)*¹⁷², two of the judges (Gibbs C.J. and Stephen J.) of the High Court expressed criticisms of the judgment of the majority the majority of the Privy Council in *Evatt* but held that it was unnecessary to choose between the majority and the minority views. They took the view that, on the facts of the case, the defendant did have ‘special skill’, but the decision of the Full Court of Western Australia in *Mohr v Cleaver*¹⁷³, following the majority of the Privy Council, has reopened the debate.¹⁷⁴

In England, preference for the minority judgment has been expressed twice in the Court of Appeal in *Esso Petroleum Co. v Mardon*¹⁷⁵ and in *Howard Marine & Dredging Co. v A. Ogden & Sons (Excavations) Ltd.*¹⁷⁶

In Canada, in *Queen v Cognos* the Supreme Court and Iacobucci J., in particular, explicitly rejected any approach that would restrict the duty of care to “...‘professionals’ who are in the business of providing information and advice...”¹⁷⁷ However, modern cases continue to list *special skills* as a necessary element for recognition of a duty of care.¹⁷⁸ Academics have pointed out that *special skill* is not precisely the same as ‘in the business or profession’, which has been rejected outright in Canada. It differs from the simple business requirement in that special skill or expertise is the key; *Evatt* may have intended to preclude a duty of care with respect to bare information communicated in the course of the defendant’s business.¹⁷⁹ In other words, the issue seems to be still unresolved.

In New Zealand, according to Professor Todd, the decision in *Evatt* has been interpreted in such a way as to deprive it of any real significance and in the Court of Appeal it was read as a case decided on its own particular facts.¹⁸⁰

¹⁷² (1981) 150 C.L.R. 225. In this case, the plaintiff enquired about road widening proposals governing property they were contemplating purchasing for redevelopment. They were misled and later sued.

¹⁷³ [1986] W.A.R. 67.

¹⁷⁴ Davies, above n 151,, 489.

¹⁷⁵ [1986] 2 All E.R. 5 (C.A.)

¹⁷⁶ [1978] 2 All E.R. 1134 (C.A.)

¹⁷⁷ [1993] 1 S.C.R. 87 at 117 (S.C.C.)

¹⁷⁸ *Petro Canada Inc. v Capot-Blanc* (1992), 95 D.L.R. (4th) 69 (B.C.S.C.); *Kingu v Walmar Ventures* (1986), 38 C.C.L.T. 51 (B.C.C.A.), per McLachlin J.A. and *Solar U.S.A. Inc. v Saskatchewan Minerals* [1992] 3 W.W.R. 15 (Sask.Q.B.).

¹⁷⁹ Feldthusen, above n 2, 73. He also mentions that although the minority judgment is perhaps followed by the Supreme Court in *Nunes Diamonds Ltd. v Dominion Electric Protection Co.* [1972] S.C.R. 769 the decision has generally been ignored in Canada. Ibid., p. 75, note 228.

¹⁸⁰ In *Meates v Attorney-General* [1983] NZLR 308 Woodhouse P and Ongley J said that it did not purport to lay down all-embracing principle. Special skill or knowledge cannot be regarded as a pre-condition for a duty, although sometimes it is a relevant consideration in determining the duty equation. Todd, above n 4, 216.

2.1.8 To whom does the duty extend.

One of the central issues in negligence liability is the determination of the class of persons to whom a duty of care may be owed. An often quoted answer to this question is Cardozo's C.J. speech in *Palsgraf v Long Island R.R. Co.*¹⁸¹: 'The orbit of the danger as disclosed to the eye of a reasonable vigilance would be the orbit of the duty.' But this related to physical loss. In relation to pure economic loss, the foreseeability test would be insufficient.¹⁸² The possible liability which might result from communication of a statement to remote plaintiffs is so great and may be so far out of proportion to the fault involved that there is a general agreement that a more restricted rule is necessary in the case of economic loss than where there is tangible harm to property.¹⁸³

The issue about to whom, other than to the other party to the contract is the defendant liable has most frequently arisen in the context of the potential liability of company auditors to shareholders and other investors who relied on the company audit. For many decades the privity defence in the area of accountant's liability was the strength of the practical arguments supporting the *Ultramares* decision¹⁸⁴ where Judge Cardozo noted:

If liability for negligence exists, a thoughtless slip or blunder, the failure to detect a theft or forgery beneath the cover of deceptive entries, may expose accountants to a liability in an indeterminate amount for an indeterminate time to an indeterminate class. The hazards of a business conducted on these terms are so extreme as to enkindle doubt whether a flaw may not exist in the implication of a duty that exposes to these consequences.¹⁸⁵

The foundations for the modern law in relation to claims by third parties against accountants can be considered as laid in Lord Denning's dissent in *Candler*¹⁸⁶ where he said that accountants, exercising a calling which required knowledge and skill, owed a duty to use care in the work, not only to their clients, but also to any third person to whom they showed their accounts and reports, or to whom they knew their clients were going to show them, when they knew that person would consider them with a view to the investment of money or taking other action to his gain or detriment. The duty only extended to those transactions for which the accountants knew their accounts were required.¹⁸⁷

¹⁸¹ (1928) 162 N.E. 99.

¹⁸² David Partlett, *Professional Negligence*, (1985) 62.

¹⁸³ Prosser, *Law of Tort*, 2nd ed, 543.

¹⁸⁴ Joseph Dawson, 'Auditors' third party liability: an ill-considered extension of the law' (1971) 46 *Washington Law Review*, 675, 679.

¹⁸⁵ *Ultramares Corp. v Touche, Niven & Co.* (1931) 174 N.E. (New York C.A.) 441 at 444.

¹⁸⁶ David Partlett, above n 182, 253.

¹⁸⁷ [1951] 2 K.B. 164 at 180-181 and 182-184.

Cane has described Denning's view as the convergence of two different aspects: to whom is the duty of care owed, and in respect of what transactions. The answers to that were: a) the very person(s) to whom the defendant knows the statement will be relayed; and (b) in respect of the very transaction for which the defendant knows his statement will be required.¹⁸⁸

In the leading case of *Caparo Industries plc v Dickman*¹⁸⁹ the issue was whether auditors could be liable to claimants who had purchased shares in a company on the strength of accounts which had negligently misstated its financial position.

The English Companies Act stipulates that a corporation must hire an auditor, appointed by the shareholders, to prepare a report on the corporation's annual financial statements. The Act requires the report to state whether the corporation has prepared the relevant information in accordance with the Companies Act and whether the financial statements give a true and fair view of the company's affairs.¹⁹⁰ The annual accounts and an auditor's report on them for each publicly listed company are available to a member of the public whether or not he or she is a shareholder, by searching the register, upon payment of any prescribed fee. A publicly listed company is also obliged to send the accounts to all persons entitled to receive notice of general meetings. Apparently then there are two main groups of persons who might seek to rely on a publicly available auditor's report. First, non-shareholders who seek guidance to assist them in deciding whether or not to invest in a certain company. Second, existing shareholders who, as individuals, seek guidance as to whether to increase, retain or reduce their investment, and, as a class or group, will use the report as a basis for measuring the conduct of the directors in prosecuting the company's affairs.¹⁹¹

Immediately after the release of the annual financial statement, prepared by the accounting firm, Touche Ross, Caparo began purchasing shares in a public company, Fidelity p.l.c. Following receipt of the audited statements in its capacity as a shareholder, Caparo purchased more shares and ultimately took over the company. The plaintiff then alleged that Fidelity's accounts were inaccurate and misleading and that the auditors had been negligent in carrying out the audit. The case went to the House of Lords on the preliminary issue of

¹⁸⁸ Cane, above n 149, 871.

¹⁸⁹ [1990] 2 A.C. 605.

¹⁹⁰ Rian Cheffins, 'Auditor's liability in the House of Lords: a signal Canadian courts should follow.' (1991) 18 *Canadian Business Law Journal*, 118, 119.

¹⁹¹ Kevin Nicholson, 'Third party reliance on negligent advice', (1991) 40 *International & Comparative Law Quarterly*, 551, 553.

whether the auditors owed Caparo a duty of care either as a potential investor, or as an existing shareholder of Fidelity.

There are two aspects of *Caparo* which are of importance. One is in relation to the liability of auditors to persons who might rely on audited accounts. The other one is the wider question of the test to be used to establish the existence of a duty of care whenever there is a claim in tort for negligence causing economic loss. This case introduced, as elements demonstrating the existence of a duty of care, foreseeability of damage, a relationship characterised by the law as one of proximity, and circumstances such that the court considers it 'fair, just and reasonable' to impose a duty. It was the application of this revised test for duty which enabled the House of Lords to find on the facts of *Caparo* that auditors owed no duty of care to shareholders in the company who used information in the audited reports of the company to decide to purchase further shares.¹⁹²

Another specific aspect that was subject of discussion was whether it made a difference that the claimants were already shareholders at the time that they made, in reliance on the negligently audited accounts, their purchases of further shares.¹⁹³ The trial judge held that the auditors owed no duty of care to Caparo, whether they were regarded as potential new investors or as existing shareholders. The Court of Appeal, by a majority, partially reversed this decision, finding that the auditors owed Caparo a duty of care once Caparo had become a shareholder in Fidelity, though not before that time.

In the House of Lords, one of the main speeches was delivered by Lord Bridge. He considered that the salient feature of cases such as *Hedley Byrne*, *Candler* and *Smith v Bush* was that the defendant giving advice or information was fully aware of the nature of the transaction which the plaintiff had in contemplation; knew that the advice or information would be communicated to him directly or indirectly; and that he knew that it was very likely that the plaintiff would rely on that advice or information in deciding whether or not to engage in the transaction in contemplation. But he said that the situation was entirely different where a statement is put into more or less general circulation and may foreseeably be relied on by strangers to the maker of the statement for any one of a variety of purposes which the maker of the statement has no specific reason to anticipate.¹⁹⁴ He believed that to hold the maker of the statement to be under a duty of care in respect of the accuracy of the

¹⁹² Robyn Martin, 'Professional responsibility and Morgan Crucible' (1991) 7 *Professional Negligence*, 37

¹⁹³ Christopher Butcher, 'Auditors, Parliament and the courts, the development and limitation of auditors' liability.' (2008) 24 *Journal of Professional Negligence*, 66, 71. Alastair Mullis and Ken Oliphant, 'Auditor's liability' (1991) 7 *Professional Negligence*, 22, 23.

¹⁹⁴ At 620.

statement to all and sundry for any purpose for which they may choose to rely on it is not only to subject him, in the classic words of Cardozo C.J., to ‘liability in an indeterminate amount for an indeterminate time to an indeterminate class’; it is also to confer on the world at large the quite unwarranted entitlement to appropriate for their own purposes the benefit of the expert knowledge or professional expertise attributed to the maker of the statement.¹⁹⁵ Thus, he disposed of the first part of the plaintiff’s claim.

Then he dealt with the second part, that is, that once that the plaintiff became a shareholder, the auditors did owe the plaintiff a duty of care because he was no longer an unidentified member of the public but was a member of an identifiable class which stood in a relationship of proximity with the company’s auditors. He considered that the annual accounts of a company can be relied on in all sorts of ways and for many purposes. Lord Bridge admitted that one of the auditor’s functions is to give his opinion in relation to whether the company’s accounts give a true and fair view of the company financial position and this, he said, undoubtedly establishes a relationship between the auditors and the shareholders. However, he concluded that that does not necessarily mean that a duty of care was owed in law by a public company’s auditors to individual shareholders for investment decisions that they might make in reliance on the company’s audited accounts.¹⁹⁶

After making the distinction between the capacity of a shareholder exerting his rights in a general meeting and his capacity as an investor he said:

It is never sufficient to ask simply whether A owes B a duty of care. It is always necessary to determine the scope of the duty by reference to the kind of damage from which A must take care to save B harmless...Assuming...that the relationship between the auditor of a company and its individual shareholders is of sufficient proximity to give rise to a duty of care, I do not understand how the scope of that duty can possibly extend beyond the protection of any individual shareholder from losses in the value of the shares which he holds. As a purchaser of additional shares in reliance on the auditor’s report, he stands in no different position from any other investing member of the public to whom the auditor owes no duty.¹⁹⁷

Lord Roskill, in harmony with all their Lordships, rejected the *Anns* single *prima facie* test of reasonable foreseeability. In his words:

¹⁹⁵ Ibid.

¹⁹⁶ At 626.

¹⁹⁷ At 627. Marshall emphasizes that it is difficult to support the exclusion of shareholders who purchase shares in reliance upon the audit report prepared. He agrees with the Court of Appeal’s consideration that this was a case in which a sufficiently ‘proximate’ relationship could be said to exist. If it is just and reasonable that such shareholders should recover, he says, it is difficult to accept that they should not do so simply because the investment decision they took which resulted in loss was one for which others, who are not in such a close relationship with the auditors, are unable to claim. (1990) 1 *Lloyd’s Maritime and Commercial Law Quarterly* 478, 481.

The submission that there is a virtually unlimited and unrestricted duty of care in relation to the performance of an auditor's statutory duty to certify a company's accounts, a duty extending to anyone who may use those accounts for any purpose such as investing in the company or lending the company money, seems to me untenable. No doubt it can be said to be foreseeable that those accounts may find their way into the hands of persons who may use them for such purposes or, indeed, other purposes and lose money as a result. But to impose a liability in these circumstances is to hold, contrary to all the recent authorities, that foreseeability alone is sufficient...¹⁹⁸

The second main speech was delivered by Lord Oliver who, contrary to the opinion of the Court of Appeal, denied there was any logic in distinguishing shareholder-investors from investor at large. Indeed, such a distinction, in his view, was unreasonable and produced entirely capricious results. He illustrated this, by pointing out how this distinction would have left the loss Caparo sustained as a result of its initial purchase of shares irrecoverable, while losses sustained as a result of subsequent purchases could be recovered. Lord Oliver found this result particularly odd considering the fact that all share purchases were made on the basis of the same information.¹⁹⁹

In relation to the purpose of the statutory act, he said that he found no ground for believing that, in enacting the statutory provisions, Parliament had in mind the provision of information, for the assistance of purchasers of shares.²⁰⁰

It has been submitted that judges should refrain from making assertions about what Parliament had in mind when those assertions can readily be rebutted.²⁰¹ When introducing to the House of Commons the first Companies Act to require independent auditing of the accounts of public companies, the Cabinet minister responsible for the Act stated its purpose by saying that 'we are bound to endeavour so to amend the law as to ensure the fullest information being given to all those who desire to take part in companies or invest their capital...'²⁰²

After considering the speeches in *Hedley Byrne* in some detail, His Lordship stated that:

What can be deduced from the *Hedley Byrne* case, therefore, is that the necessary relationship between the maker of a statement or giver of advice ('the adviser') and the recipient who acts in reliance upon it ('the advisee') may typically be held to exist where (1) the advice is required for a purpose, whether

¹⁹⁸ At 582.

¹⁹⁹ At 599. He probably found inspiration in the example given by O'Connor L.J. in his dissenting judgment in the Court of Appeal: 'Two friends each have money to invest. One is a shareholder and received the report with the certified accounts; having read it he hands it on to his friend, who also reads it, and both decide individually to buy shares. I find it very difficult to draw any distinction between these two and as I am satisfied that the friend does not establish the required proximity I conclude nor does the shareholder.' [1989] 1 All E.R. 798 at 830.

²⁰⁰ At 601.

²⁰¹ Mullis & Oliphant, above n 193, 26.

²⁰² Apud Mullis & Oliphant, above n 193, 26.

particularly specified or generally described, which is made known, either actually or inferentially, to the adviser at the time when the advice is given; (2) the adviser knows, either actually or inferentially, that his advice will be communicated to the advisee, either specifically or as a member of an ascertainable class, in order that it should be used by the advisee for that purpose; (3) it is known, either actually or inferentially, that the advice so communicated is likely to be acted upon by the advisee for that purpose without independent inquiry; and (4) it is so acted upon by the advisee to his detriment.²⁰³

By applying this test, Lord Oliver was, for the same reasons as Lord Bridge, in no doubt that the auditors owed no duty of care to the plaintiff as an investor or as a shareholder.

The decision, which represented a screeching halt in the expansionist tendency in the U.K.²⁰⁴, brought a sense of relief in the professional circle²⁰⁵; but met mixed reception from academic commentators, ranging from approval²⁰⁶ to concern.²⁰⁷ Quite unexpectedly, the editorial column of *Accountancy*, the official magazine of the Institute of Chartered Accountants, admitted that it was unjust that third parties should have no redress against negligent auditors.²⁰⁸ The House of Lords' view, that the purpose of the statutory requirement that company accounts be certified by an auditor is to allow shareholders as a body to exercise informed control of the company and not to ensure that investment decisions are made on the basis of sound information, was described in the editorial as 'naive', 'narrow' and 'Victorian'. 'The law's view of auditors' responsibilities', they say, 'is now out of step with commercial reality. The ability to rely upon audited accounts is an essential feature of modern commercial life. Particularly in the case of a public company...audited accounts are used barely at all by shareholders acting *en bloc* to control the company and its management, but they are used by a wide range of creditors and individual or corporate investors.'²⁰⁹

The courts in Canada, Australia and New Zealand have all taken the same or similar approach to that adopted in *Caparo*.²¹⁰

²⁰³ At 638.

²⁰⁴ Ivan F. Ivankovich, 'Accountants and third-party liability. Back to the future.' (1991) 23 *Ottawa Law Review* 505, 507.

²⁰⁵ "...the decision of the House of Lords in *Caparo* was supposed to be welcomed at least by the accountancy profession for whom the decision of the Court of Appeal had brought little comfort. The decision is not such good news for investors and the common law now appears to offer them less protection than purchasers of real property." Cf. Michael F James, 'Negligence and the auditor's duty of care after *Caparo*.' (1990) *Professional Negligence* 69, 74.

²⁰⁶ Weir describes the decision as quite right, arguing that *Caparo* was not an investor that was investing in Fidelity p.l.c., 'it was buying it, taking it over. *Caparo* was a predator...with a turnover of over £150m. it is among the top 500 manufacturing companies in Britain...*Caveat predator* is a sound and moral rule.' Tony Weir, 'Statutory auditor not liable to purchaser of shares' (1990) *Cambridge Law Journal*, 212, 214

²⁰⁷ Marshall, on the contrary, describes the approach as *unduly restrictive*. Marshall, above n 197, 481.

²⁰⁸ *Accountancy*, March 1990, p. 1.

²⁰⁹ *Ibid*.

²¹⁰ Todd, above n 4, 208.

2.1.9 *Hedley Byrne* in other common law jurisdictions.

a) Canada

The issue of whether an auditor's duty of care extended to shareholders or other investors was addressed by the Supreme Court of Canada in *Hercules Managements Ltd. v Ernst & Young*.²¹¹ In so doing, the Court considered the test developed by Dickson J some 20 years earlier in *Haig v Bamford*²¹² (where the question of how much further the courts were willing to extend the duty of care was left open) as well as the decision of the House of Lords in *Caparo v Dickman*.

The defendants were accountants who had been hired by two related companies to perform annual audits of their financial statements and to provide audit reports to the companies' shareholders. In 1989 the companies went into receivership. After that, the plaintiffs, who were shareholders of the companies, brought an action alleging that the audit reports were negligently prepared. They also argued that, in reliance on those reports, they had made further investments and consequently suffered financial loss, and claimed compensation for the losses they had sustained in the diminished value of their existing shares. The Supreme Court rejected both of these claims.

Two main issues were in question: a) whether the auditors owed shareholders a duty of care in relation to investment losses they suffer as a result of reliance on the audit reports; and b) whether a derivative action was the proper method of proceeding with the claim, as an alleged harm to the corporation does not give individual shareholders a personal cause of action.²¹³

The Supreme Court, unanimously, decided that investors should generally not be permitted to recover against a company's auditor when financial reports are prepared for the company. The ambit of the duty should be restricted to losses suffered in the context of the purpose for which the audits were prepared. The position of the Court was essentially similar to the one taken by the House of Lords in *Caparo*, requiring that (a) the defendant knew the identity of either the plaintiff or the class of plaintiffs who would rely on the statement, and (b) the reliance losses claimed by the plaintiff stem from the particular transaction in respect

²¹¹ [1997] 146 DLR (4th) 577.

²¹² (1976) 72 D.L.R. (3d) 68 (S.C.C.)

²¹³ Michael Deturbide, 'Liability of auditors. *Hercules Managements Ltd. et al. v Ernst & Young et al.*' (1998) 77 *Canadian Bar Review* 260, 261.

of which the statement at issue was made.²¹⁴ As in *Caparo*, the claims were considered to fall outside the statutory purpose for which the statement had been prepared.

Also as in *Caparo*, the Court considered that the purpose of an audit report is to provide shareholders with reliable information to enable them to make decisions as to the manner in which they want the corporation to be managed, rather than to assist individuals shareholders in making personal investment decisions.

La Forest J., speaking for the Court, said that, in Canada, the established approach to the existence of a duty of care is the two-part test enunciated by Lord Wilberforce in *Anns v Merton London Borough Council*.²¹⁵ This represents a single, unified test for all cases of negligence. The notion of a distinct nominate tort of negligent misrepresentation, in which a different test is applied, was explicitly rejected.²¹⁶ Applying it to the facts of the case, La Forest J. had no hesitation in holding that a *prima facie* duty of care was owed by the defendant to the plaintiff, not only because it was reasonably foreseeable²¹⁷ by the defendant that the plaintiff would rely on the financial statements in conducting its affairs and that the plaintiff might suffer harm if those statements had been negligently prepared, but also because reliance by the plaintiff on the audited statements was reasonable on the facts of that case.

Having found a *prima facie* duty to exist, La Forest J. proceeded to the second part of the test. In that sense, he analyzed the policy reasons for limiting liability under step two. After considering the benefits of imposing broad duties on auditors and its deterrence effect on negligent conduct, La Forest J., however, thought that this was outweighed by the socially undesirable consequences to which the imposition of indeterminate liability on auditors might lead.²¹⁸

²¹⁴ Per La Forest J. at 590.

²¹⁵ [1978] AC 728. In doing so, the Court moved away from *Caparo*, but only to come back to it by incorporating, within the framework of the *Anns* test, most of the principles developed by *Caparo* to limit the ambit of the duty of care. Lara Khoury, 'The liability of auditors beyond their clients: a comparative study.' (2000-2001) 46 *McGill Law Journal*, 413, 438.

²¹⁶ Chris Gosnell, 'English Courts: The restoration of a common law of pure economic loss.' (2000) 50 *University of Toronto Law Journal*, 135, 148.

²¹⁷ Feldthusen submits that in Canada, in the context of economic loss, proximity had usually been treated unreflectively as more or less synonymous with foreseeability. Above n 4. Phegan argues that Canadian Courts have never displayed enthusiasm for the elevation to the level of prominence and decisiveness accorded it by the High Court of Australia. The more specific requirements, on which the Canadian Supreme Court based its conclusions, he says, are not ingredients of proximity but rather means by which policy concerns that are extrinsic to simple justice –but are, nevertheless, fundamentally important– may be taken into account in assessing whether the defendant should be compelled to compensate the plaintiff. Colin Phegan, 'Reining in Foreseeability: *Liability of Auditors* to Third Parties for Negligent Misstatement' (1997) 5(2) *Torts Law Journal* 15.

²¹⁸ At 593. Whether such consequences are aptly described as social or would be more accurately described as economic is open to question. Phegan, above n 217, 123.

Rafferty has welcomed *Hercules Managements*, saying that is important because it confirms the supremacy in Canada of the *Anns* test for determining the duty of care even in the familiar area of negligent misstatement. He also finds of particular interest La Forest J.'s conclusion that proximity in this context is based on foreseeable and reasonable reliance. For the first time, he says, the Supreme Court has clearly set out the basis for the *Hedley Byrne* duty of care, signaling a rejection of the popular theory that the true foundation for *Hedley Byrne* is the defendant's voluntary assumption of responsibility.²¹⁹

Taking a different view, Feldthusen submits that the reasoning in *Caparo* is to be preferred because the House of Lords clearly recognized the distinction between the questions of justifying liability, and the questions of practical limitations. He points out that what is missing in *Hercules* is any justification for the result. In his opinion, reasonable reliance reduces to foreseeability and concludes that what is missing from the judgment is an acknowledgment that one cannot impose tort liability on another simply by choosing to rely on the other to protect one's interests.²²⁰

What is *fair* or *just*, he asks, about holding that a party who supplies professional services under contract owes a duty of care to anyone else who might foreseeably rely on the information or advice? Holding one party liable, he continues, is expensive and stigmatizing.

(b) Australia.

Although the High Court of Australia had built a body of decisions on negligent misstatements applied to other classes of defendants, it was not until *Esanda Finance Corporation Limited v Peat Marwick Hungerfords (Reg)*²²¹ that it had the opportunity to rule on auditor's liability.²²²

In this case, the plaintiff claimed damages from a firm of accountants (PMH) in respect of its losses incurred through having lent money to a company (Excel Finance Corporation) relying on a certification negligently prepared.

The case was based on the existence of the Australian Accountancy Standards and the claim that the reliance upon the audited accounts was reasonably foreseeable. The standards

²¹⁹ Nicholas Rafferty, 'Recent Professional negligence decisions from the Supreme Court of Canada.' (1998) 14 *Professional Negligence*, 67, 74.

²²⁰ Feldthusen, above n 2, 45. The Idea of information and advice as valuable commodities is probably taken from William Bishop, 'Negligent misrepresentation through economists eyes.' (1980) 96 *Law Quarterly Review*, 360.

²²¹ (1997) 142 ALR 750.

²²² Phegan, above n 217, 3.

required auditors to consider the position of persons who were likely to be the prime users of the financial statements, which included present and potential providers of equity or loan capital and creditors. The plaintiff alleged that it was a member of that class in relation to Excel and, as a consequence, it was owed a duty of care. All six judges ruled that the claim was insufficient to found a cause of action in negligence.

The Court considered that the Accountancy Standards were not concerned to create a duty, but to develop the concept of materiality for the purpose of indicating what should be included in financial statements. The standards may be a guide to the appropriate standard of care once a duty is imposed, but they do not create a duty.²²³

In relation to the other point, using almost identical criteria as the ones enunciated in *Caparo*, Brennan CJ said:

The uniform course of authority shows that mere foreseeability of the possibility that a statement made or advice given by A to B might be communicated to a class of which C is a member, and that C might enter into some transaction as the result thereof and suffer financial loss in that transaction, is not sufficient to impose on A a duty of care owed to C in the making of the statement or the giving advice. In some situations, a plaintiff who has suffered pure economic loss by entering into a transaction in reliance on a statement made or advice given by a defendant may be entitled to recover without proving that the plaintiff sought the information or advice. But, in every case, it is necessary for the plaintiff to allege and prove that the defendant knew, or ought reasonably to have known, that the information or advice would be communicated to the plaintiff, either individually or as a member of an identified class, that the information or advice would be so communicated for a purpose that would be very likely to lead the plaintiff to enter into a transaction of the kind that the plaintiff does enter into, and that it would be very likely that the plaintiff would enter into such a transaction in reliance on the information or advice and thereby risk the incurring of economic loss if the statement should be untrue or the advice should be unsound.

The speeches of McHugh J. and Gummow J. were strongly influenced by the decision of the Supreme Court of California in *Bily v Arthur Young and Co.*²²⁴ Both of them set out a number of policy considerations which they believed should influence the court in determining whether an auditor should owe a duty of care to a third party. McHugh J., in particular, expressed the opinion that the primary question, from the public points of view, is who is the more efficient absorber of the losses which inevitably will be passed on to the public. He thought that the auditors' capacity to better absorb the loss was a matter which could quite properly have been put in argument in support of imposing liability on the auditors.²²⁵

In support of a confined scope of liability Mc Hugh J set out a number of factors relevant to the existence of duty:

²²³ Per McHugh at 788.

²²⁴ (1992) 834 P 2d 745.

²²⁵ At 784.

a) The risk of reduction in supply of services. Indeterminate liability is difficult to insure against. Increased insurance cost (or no insurance) will lead to the closure of smaller firms, selective withdrawal of services and reduction in standards resulting from cost cutting of overheads and staff.²²⁶

b) Most investors have the capacity to avoid the risk which they seek to have auditors bear. They normally have the resources to protect themselves, thus averting what would otherwise be a heavy cost burden on the system of corrective justice.²²⁷

c) Creditors and shareholders are entitled to share the benefits of any recovery made by a liquidator or receiver from the auditor. A creditor or shareholder granted a right to sue the auditor directly stands to gain a double advantage not necessarily justified when compared with other creditors or shareholders.²²⁸

d) The primary wrongdoer is ordinarily the corporate body, not the auditor. The auditor is left to foot the bill even though on a comparative basis the auditor may bear only a minor and secondary responsibility for the plaintiff's loss.²²⁹

e) Problems of proof of actual reliance pose formidable practical obstacles and also create possibilities of unreliable, exaggerated and even fraudulent claims. An assertion of actual reliance is easily made in retrospect.²³⁰

(c) New Zealand.

In New Zealand, the Court of Appeal in *Scott Group Ltd. v McFarlane*²³¹ debated the extent of the duty of care. Auditors had been negligent in understating a company's bank overdraft and overstating its revenue reserves and undistributed profits. The profits of subsidiary companies were reflected twice in the same set of accounts and consequently, the total value of shareholders' funds had been overstated. At the time of signing the audit report, the auditors had no knowledge of any intention on the part of any other person to formulate a takeover offer for the company. The plaintiff had been showing an interest in taking over the company (Duthie) for some time, but this was kept strictly confidential. Thus, the auditors had no knowledge that the accounts would be shown to the Scott group or to any other entity for the purpose of a takeover bid. The plaintiff company made a takeover offer and found

²²⁶ At 781.

²²⁷ At 783.

²²⁸ At 784.

²²⁹ At 785.

²³⁰ Ibid.

²³¹ [1978] 1 N.Z.L.R. 553.

upon that takeover that the shares did not possess as much asset-backing as appeared from the balance sheet. Subsequently they brought an action claiming damages for negligent misrepresentation.

The claim was based on the fact that the defendants were aware or ought reasonably to have foreseen that the accounts were likely to be relied upon by the plaintiff as an intending purchaser of the shares.

The Court considered that a duty existed, but had not been breached, as the plaintiff had not discharged the burden of proof on the question of damages.

The majority denied that reasonable foreseeability was too broad a test of liability for economic loss caused by words.²³² They were persuaded that liability should be brought within the mainstream of negligence. Restrictive tests in the negligent misstatement area had simply brought complexity to the law.²³³ Woodhouse J., in particular, thought that the requirement of foreseeability coupled with the difficulties of proving causation provided adequate protection against excessive liability.²³⁴ However, it has been suggested that, although it might appear on the surface as if Woodhouse J. was advocating a single test of foreseeability of plaintiff as the basis of liability for economic loss as well as physical loss, his Honour's notion of foreseeability in *Scott Group* was much more restrictive than that employed in the ordinary run of physical loss cases.²³⁵

He also said that the duty existed even though the defendant had 'no direct knowledge of Scott Group Ltd. or that a take-over from any quarter was contemplated'²³⁶ on the basis that the accounts were freely available to the public. A need to establish knowledge of the very identity of those proposing to act upon advice would seem not merely an extremely stringent but an almost fortuitous test of responsibility.²³⁷

Cooke J. said that, as the defendants knew that the state of the company's finance were such as to make it vulnerable to a takeover bid, there was a *virtual certainty* that in such an event the accounts would be relied on by an offeror. In these circumstances there was a sufficient degree of proximity between the parties and the accountants owed a duty of care to the offeror.

²³² Witting suggests that it is likely that the New Zealand courts today would be more carefully consider the purpose element in such a case. Christian Witting, *Liability for negligent misstatements*. (2004) 192.

²³³ At 574.

²³⁴ At 572. His judgment was the first to favour a double foreseeability test as used in physical damage cases. Cf. Feldthusen, above n 2, 102.

²³⁵ Cane, above n 149, 873.

²³⁶ At 575.

²³⁷ At 574.

Richmond P., dissenting, denied relief on the ground that, at the time the certificate was given, the most that could be said was that there was a general possibility that someone might take the company over. Mere foreseeability of reliance on company accounts for the purposes of a takeover bid was not enough. In his opinion, the requirement of the special relationship was central to the duty of care. He said:

I do not think that such a relationship should be found to exist unless, at least, the maker of the statement was, or ought to have been, aware that his advice or information would in fact be made available to and be relied on by a particular person or class of persons for the purposes of a particular transaction or type of transaction.²³⁸

Feldthusen has suggested that Cooke J., in his characterization of the facts of the case as one in which the defendants ought to have known that their accounts would be relied upon in a particular transaction, seems to be somehow dealing with the benefit of hindsight. In that sense, he believes Richmond P. is more realistic in characterizing the case as one in which *ex ante* the defendant had no particular transaction in mind, and hence one in which the defendant faced potentially indeterminate liability to any foreseeable plaintiff.²³⁹

For more than twenty years *Scott Group* remained a source of uncertainty but, finally in *Boyd Knight v Purdue*²⁴⁰ the question was settled. An investor claimed against an auditor who was required by the Securities Regulation to produce a report. He alleged that the report in the prospectus was wrong and that with due care the auditors would have discovered the inaccuracies. The Court recognised a duty of care to investors but the action failed because there was not enough evidence that he had read and relied upon the report.

Dawson submits that in holding that reliance on the misstatement is required before liability is made out the case does not break new ground because, after all, it is reliance that provides the necessary causal connection between a defendant's misrepresentation and a plaintiff's loss. However, he continues, the case is troubling in suggesting that reliance cannot be inferred from the circumstance of a material omission from the audit report coupled with the purchase of securities. Dawson suggests that Purdue had done precisely what any small investor who is not expert in reading financial statements would have done. They would not be expected to examine the financial statements in any detail, but only to look what the auditors had said and to content themselves with the view that the auditors had given a clean report.²⁴¹

²³⁸ At 566.

²³⁹ Feldthusen, above n 2, 101.

²⁴⁰ [1999] 2 NZLR 278 (CA)

²⁴¹ Francis Dawson, 'A fair inference of reliance' (2000) *New Zealand Law Review* 125,132.

In spite of the criticisms, for the time being, it seems clear that New Zealand is also in favour of *Caparo*.

2.2 Relational economic loss.

2.2.1 Generally.

The expression *relational economic loss* describes a harm which arises as a consequence of a physical injury to a third party or damage to the third party's property.²⁴² In other words, the plaintiff suffers economic loss because of some relationship which exists between the plaintiff and the injured party.²⁴³

Where a careless act or omission causes a claimant to sustain personal injury or suffer direct damage to property, the common law has always allowed him to recover damages for resultant economic loss. Consequential loss in property damage cases is recoverable without any difficulty.²⁴⁴ Thus, hospital, medical and other such costs are retrievable. Similarly, loss of income and profits are allowed. Normally, these losses must follow directly from physical injury or physical damage to the property of the person suing and not from an injury to someone else. The rationale for allowing such recovery is that the fear of indeterminate liability is restricted by the necessity of the plaintiff's having to establish some personal injury or physical damage, however slight and however fortuitous.²⁴⁵

However, where the interest which has been interfered with is of a purely financial nature unconnected with damage to the plaintiff's person or property²⁴⁶, the law of negligence has traditionally displayed a reluctance to provide any redress.²⁴⁷ The logic of this position, says Markesinis, may not be immediately obvious; nor, indeed, is it shared by many other legal systems. Why should recovery for economic loss be made to depend upon the fortuitous event that it is sustained through the medium of physical or property damage?²⁴⁸ Part of the reason for this reluctance may well be historical, but it is also founded on a pragmatic

²⁴² Bernstein, above n 23, 163.

²⁴³ Feldthusen, above n 2, 193.

²⁴⁴ Todd, above n 4, 253.

²⁴⁵ Most commentators agree that given the rudimentary conceptual control devices in the early law of negligence the courts feared that once a duty to avoid economic loss was admitted in a relationship wider than contract there would be no logical stopping place to this kind of liability. Harvey, above n 171, 582.

²⁴⁶ Ownership is not really necessary, possession will do. The common law has always equated possession and ownership for this purpose: hence a bailee could sue for the full value of the goods bailed to him (even though his interest was limited) whether or not he was responsible to the owner for the loss. *Winfield & Jolowics on Tort*, (1998) 135.

²⁴⁷ Michael MacGrath, 'The recovery of pure economic loss in negligence – an emerging dichotomy.' (1985) 5 *Oxford Journal of Legal Studies*, 350.

²⁴⁸ Basil Markesinis, *Tort Law* (1999) 68.

ground: the fear of imposing a 'liability in an indeterminate amount for an indeterminate time to an indeterminate class.'²⁴⁹

A further factor, suggested by Professor Fleming, is 'a fancied anxiety not to trench upon the sphere of contract and its basic philosophy that a claim to economic advantage must trace its source to a promise for consideration'.²⁵⁰ The declining of the influence traditionally exercised by contract law in precluding recovery in tort for purely economic loss has been emphasised by Rafferty.²⁵¹ In effect, some of the decisions on pure economic loss are plainly motivated by the court's view that the law of contract puts too many obstacles before the plaintiff, and that the law of negligence should be used to evade these obstacles. The requirement of privity, in particular, is seen as worthy of evasion. Blom, however, suggests that problems in using negligence in this way are becoming apparent, especially the inaptness of negligence to take account of the whole complex of rights and duties that parties have deliberately set up by contract to fix their rights and responsibilities, and that the law (leaving consumer protection to one side) should therefore respect.²⁵²

Stevens believes that one reason why the courts have been forced to 'stop short' and deny all plaintiffs a cause of action is because, so far, no regulator has been found by which liability for pure economic loss could be determined.²⁵³

Atiyah submits that some scepticism may be felt about the validity of the floodgate argument since, at various stages in the past, the courts have been reluctant to allow new types of action for fear of 'opening a wide field' and time after time this fear has been

²⁴⁹ Per Cardozo CJ in *Ultramares Corporation v Touche* (1931) 255 NY 170, 179. Or, as Bishop puts it, allowing recovery in such cases would place too great a burden on enterprise. W. Bishop, 'Economic loss in tort.' (1982) 2 *Oxford Journal of Legal Studies*, 1. Atiyah emphasises that in *Cattle v Stockton* and in *Weller v Foot and Mouth Disease Research Institute* it is clear that the judges were alarmed at the possible repercussions of allowing claims for purely pecuniary loss. He reminds us that Widgery J. in the *Weller* case said that if the plaintiffs had been entitled to recover there for their loss of profits, there was no obvious reason why butchers who had suffered from the outbreak of foot and mouth, and even carriers who transported meat and others more remotely affected, might not be entitled to claim for their losses. Patrick Atiyah, 'Negligence and economic loss' (1967) 83 *Law Quarterly Review*, 248, 270. The weakness of economic interests is clear when compared with e.g. the interest in physical security. It has been suggested that this kind of comparison makes sense when one considers that one can jettison the cargo, but not the passenger, to save a ship; or detain property, but not its owner, as security for a debt. Tony Weir, *A casebook on tort* (3rd ed. 1974) 469. The reference to the cargo and the passenger does not seem appropriate. The example is only valid in relation to conflict of interests (property v life), but it does not give any support to the justification of compensation of physical but not economic loss.

²⁵⁰ Fleming, *The law of torts*, (4th ed, 1971) 164. Joost Blom, 'Economic loss: curbs on the way ahead?' (1986-1987) 12 *Canadian Business Law Journal*, 275.

²⁵¹ Nicholas Rafferty, 'Recovery in tort for purely economic loss: contract law on the retreat.' (1986) 35, *University of New Brunswick Law Journal*, 111.

²⁵² Joost Blom, 'Economic loss: curbs on the way ahead?' (1986-1987) 12 *Canadian Business Law Journal*, 275, 293.

²⁵³ L.L. Stevens, 'Negligent acts causing pure financial loss: policy factors at work.' (1973) 23 *University of Toronto Law Journal*, 431, 451.

disproved by subsequent events, *Donoghue v Stevenson*²⁵⁴ being the best-known example.²⁵⁵ In fact, in itself, floodgates is a weak argument, since extensive liabilities are just as likely to arise in certain cases of physical damage like in some pollution or products liability cases.²⁵⁶

Another reason is the court's reluctance to overburden business and other activity with the cost of *all* potential economic losses resulting from substandard conduct.²⁵⁷

It is also suggested that it may be more efficient to have these economic losses borne by those who incur them initially than to shift them to the activities which produce them. After all, potential pecuniary losses are usually viewed as ordinary business risks which businessmen must take into account in their plans.²⁵⁸

Finally, the law tends to discourage a multiplicity of law suits. Instead, several claims are channelled into one action whenever is possible. Pursuant to this policy, the courts, which may have rejected the independent right of action for financial loss flowing from physical damage or injury to another person, do permit a parasitic claim for pecuniary loss when it springs from physical damage of some sort to the claimant.²⁵⁹

The exclusionary rule has also been based on a preference for contract over tort as a means of protecting financial interests. It is said that people should try to cover economic losses by contracting directly with potential tortfeasors or, in case this is not possible, through insurance.²⁶⁰

All these policy factors, however, have not prevented the courts from gradually moving to provide protection where they felt there was sufficient guarantee that liability could be controlled and would not get out of hand.

2.2.2 The exclusionary rule.

From at least 1875 in England until the mid-1960s, the common law recognised a firm exclusionary rule precluding recovery for all but exceptional cases of relational economic loss.²⁶¹ *Cattle v Stockton Waterworks Co.*²⁶² is the leading historical antecedent barring

²⁵⁴ [1932] AC 562, [1932] All ER 1 (HL).

²⁵⁵ Atiyah, above n 249, 270.

²⁵⁶ Markesinis, above n 248, 89.

²⁵⁷ Fleming, *The law of Torts* (6th ed. 1983) 162.

²⁵⁸ Atiyah, above n 249, 270.

²⁵⁹ Allen M. Linden, *Canadian Tort Law* (4th ed. 1988) 379.

²⁶⁰ Markesinis, above n 248, 90.

²⁶¹ Feldthusen, above n 2, 194.

²⁶² 10 L.R.Q.B. 453 (1875) Although the decision in this case was not based on the application of any general principle as such, it has been commonly regarded as laying the foundations of what later became known as the

recovery of purely economic loss in negligence actions. In *Cattle*, the defendant waterworks company negligently laid and maintained a water pipe under a turnpike road. Unknown to anyone, the pipe leaked and a large amount of water accumulated in the soil. The owner of the road's soil and the adjoining land had contracted to have the plaintiff Cattle construct a tunnel under the road for a fixed sum. Cattle began his work and removed the soil, which caused an increase in the flow of water and obstructed the work. Cattle completed the job, but at an increased cost. He then unsuccessfully sued the defendant to recover his excess costs. The Court of Queen's Bench grounded its denial of recovery on the absence of any proximately caused physical injury.²⁶³

Although the court expressed a desire to allow recovery, the fear for an indeterminate liability was stronger. It has been suggested that here, perhaps for the first time, the oft-cited spectre of indeterminate liability was used to deny liability in what the court appears to have considered an otherwise deserving claim.²⁶⁴ In the words of Blackburn J. the court concluded that:

In the present case the objection is technical and against the merits, and we should be glad to avoid giving it effect. But if we did so, we should establish an authority for saying that, in such a case as *Fletcher v Rylands*, the defendant would be liable, not only to an action by the owner of the drowned mine, and by such of his workmen as had their tools or clothes destroyed, but also to an action by every workman and person employed in the mine who, in consequence of its stoppage, made less wages than he would otherwise have done. And many similar cases to which this would apply might be suggested. It may be said that it is just that all such persons should have compensation for such a loss and that, if the law does not give them redress, it is imperfect. Perhaps it may be so. But, as was pointed out by Coleridge J. in *Lumley v Gye* courts of justice should not 'allow themselves, in the pursuit of perfectly complete remedies for all wrongful acts, to transgress the bounds which our law, in a wise consciousness of its limited powers, has imposed on itself, of redressing only the proximate and direct consequences of wrongful acts.' In this we quite agree. No authority in favour of the plaintiff's right to sue was cited, and, as far as our knowledge goes, there was none that could have been cited.²⁶⁵

Courts that have interpreted *Cattle* have found it to require that plaintiffs suffer physical harm to a proprietary interest before they can recover in negligence actions. Some academics, however, upon examining the case (together with the American version of it, *Robins Dry Dock & Repair Co. v Flint*²⁶⁶) submit that it becomes apparent that it did not

exclusionary rule. Karen Hogg, 'Relational loss, the exclusory rule and the High Court of Australia.' (1995) 3 *Tort Law Review*, 26, 27.

²⁶³ At 457-58

²⁶⁴ Anne L. Mactavish, 'Tort recovery for economic loss: recent developments.' (1992-1993) 21 *Canadian Business Law Journal*, 395, 397.

²⁶⁵ At 457.

²⁶⁶ (1927) 275 U.S. 303. In the United States, the exclusionary rule as epitomised in *Robins Dry Dock & Repair Co. v Flint* has been referred to traditionally in terms of interference with contractual relations, which is

create the absolute rule that bars recovery for economic loss when there is no physical property damage. On the contrary, the decision rested on an absence of proximate caused injury. Nevertheless, courts have continued to assert that the case stands for the much broader proposition that recovery for purely economic loss is barred per se.²⁶⁷

The other case, described by the House of Lords as foundational in this branch of the law,²⁶⁸ took place two years later. In *Simpson & Co. v Thomson, Burrell*²⁶⁹, a Mr. Burrell was the owner of two ships which collided at sea, resulting in the total loss of one of them. The accident was entirely due to the negligence of the other ship. The plaintiff was the insurer of the sunken ship and paid its full value to Mr. Burrell as the owner of the lost ship. Then, it sought to recover from the same Mr. Burrell as the owner of the negligent ship. It was held by the House of Lords that the plaintiff could not found the alleged right on subrogation of the rights of the owner of the lost ship because that would have amounted to Mr. Burrell suing himself. But the plaintiff argued that he also had an independent right of action derived from the fact that any injury or loss sustained by the ship would indirectly fall upon him as a consequence of his contract, and that this interest was such as would support an action by the plaintiff in his own name against a wrongdoer.

The argument was rejected. Lord Penzance pointed out that the implications of that argument were that,

...where damage is done by a wrongdoer to a chattel not only the owner of that chattel, but all those who by contract with the owner have bound themselves to obligations which are rendered more onerous, or have secured to themselves advantages which are rendered less beneficial by the damage done to the chattel, have a right of action against the wrongdoer although they have no immediate or reversionary property in the chattel, and no possessory right by reason of any contract attaching to the chattel itself, such as lien or hypothecation.²⁷⁰

The *non-recovery rule* has led sometimes to a wrongful classification of some economic loss as physical loss. This can be specially seen in some defective foundation building cases as a consequence of the court's desire in the particular category of case to allow recovery, while at the same time wanting to avoid the appearance of creating a further exception to the exclusionary rule. Another difficulty is that it is not always easy to decide

criticized by Bishop as representing too narrow an interpretation of the rule. W. Bishop, 'Economic loss in tort.' (1982) 2 *Oxford Journal of Legal Studies*, 1.

²⁶⁷ Kelly M. Hnatt, 'Purely economic loss: a standard for recovery.' (1988) 73 *Iowa Law Review*, 1181, 1189.

²⁶⁸ *Candlewood Navigation Corp. Ltd. v Mitsui O.S.K. Lines Ltd.* [1986] A.C. 1 at 16.

²⁶⁹ (1877) 3 App. Cas. 279.

²⁷⁰ At 189.

whether or not the economic loss is truly consequential on physical damage (like in *Spartan Steel*).²⁷¹

It has been suggested that, in practice, the rigorous application of the rule can lead to capricious results, since it is frequently a matter of pure chance whether the financial loss is suffered by the person in the contractual relationship who also suffered the physical injury, or is suffered by another, but equally innocent party rendering it totally irrecoverable. Capricious in practice, even the historical support of the rule is suspect, since neither trespass nor the old action of *assumpsit*, the sources of negligence, were in origin confined to physical loss.²⁷²

The exclusionary rule remained in spite of the generalization of liability which occurred after *Donoghue v Stevenson*.²⁷³ After *Hedley Byrne*, some commentators thought that the inescapable implication was that the dogmatic rule was finally exorcised from the law of negligence.²⁷⁴

Professor Fleming said at the time:

...since responsibility cannot be any less for what a man does than for what he says, the recent opening of the door to claims for financial loss due to negligent misrepresentation cannot help but strike a fatal blow also at those decisions in the past which had accepted the false premise that the law of negligence made no allowance whatever to claims for purely economic loss.²⁷⁵

Atiyah, on the other hand, submits that attractive as it may seem at first sight, this is clearly untenable. Plainly, he says, *Hedley Byrne* has not overturned the great mass of case-law which would be needed to arrive at this conclusion.²⁷⁶

In *Weller & Co. v Foot and Mouth Disease Research Institute*²⁷⁷ it was clear that the force of the old authorities was as strong as ever. The plaintiffs were auctioneers in a livestock market and they sought to recover the financial loss they suffered when their market was forced to close because of an epidemic caused by the escape of a virus from the defendant's premises.

It was conceded by the defendants that the loss to the plaintiffs was foreseeable. The plaintiffs argued that since the loss was foreseeable the defendants owed them a duty of care.

²⁷¹ Robert S. Chambers, 'Economic loss' in *Essays on torts* (Ed.P.D.Finn) (1989), 54.

²⁷² Harvey, above n 171, 584.

²⁷³ [1932] A.C. 562.

²⁷⁴ Harvey, above n 171, 593; Smillie, 'Negligence and economic loss' (1982) 32 *University of Toronto Law Journal*, 231, 232; Glass 'The duty to avoid economic loss' (1977) 51 *Australian Law Journal*, 372, 375.

²⁷⁵ *The law of torts* (3rd ed) 173.

²⁷⁶ Atiyah, above n 249, 258.

²⁷⁷ [1966] 1 Q.B. 569.

Widgery J. rejected the argument, and held that the mere fact that the plaintiff's loss was foreseeable was not a sufficient ground for saying that the defendants owed a duty of care and that the earlier cases did not depend on the distinction between physical damage and pecuniary loss, but on the absence of a duty to take care.

He observed that:

'[In] an agricultural community the escape of foot and mouth disease virus is a tragedy which can foreseeably affect almost all businesses in that area. The affected beasts must be slaughtered, as must others to whom the disease may conceivably have spread. Other farmers are prohibited from moving their cattle and may be unable to bring them to market at the most profitable time; transport contractors who make their living by the transport of animals are out of work; dairymen may go short of milk, and sellers of cattle feed suffer loss of business'.²⁷⁸

Widgery J. finally added that the *Hedley Byrne* decision did not alter in any way the fundamental rule that where negligent acts were concerned; there could be no recovery for pure economic loss. The world of commerce he said, would come to a halt and ordinary life would become intolerable if the law imposed a duty on all persons at all times to refrain from any conduct which might foreseeably cause detriment to another.²⁷⁹

Harvey points out that the judge was content to say that foreseeability of economic harm does not automatically give rise to liability, but he did not say what more the law does require to establish a duty to avoid economic loss. He concludes that the unfortunate result of this has been that *Weller's* case is frequently taken as authority for the much wider proposition that pure economic loss is always irrecoverable in negligence.²⁸⁰

Atiyah suggests that apart from the fact that in many of the previous cases the matter was clearly put on the ground that economic loss was 'of a kind which the law does not regard as recoverable', and not on the ground of absence of duty, it is merely a semantic quibble to treat the question as dependent on one point rather than the other. If there was no duty to take care in the earlier cases, he says, then it could be only because there was no duty to take care to avoid financial loss.²⁸¹

It might be thought that persons with a contractual interest in property damaged or destroyed by the defendant's negligence would be in a better position, this for the reasons that there will be greater determinacy in the number of claims and thus an enhanced ability to

²⁷⁸ At 577.

²⁷⁹ At 585.

²⁸⁰ Harvey, above n 171, 593.

²⁸¹ Atiyah, above n 249, 260.

calculate the size of losses.²⁸² However, in *Candlewood Navigation Corp. Ltd. v Mitsui OSK Lines Ltd. (The Mineral Transporter)*²⁸³ it was clear that claimants in this category would have no better luck than their counterparts who had no contractual interest in property. It has been submitted that, as a general rule, permitting recovery would generate a considerably larger class of potential litigants and might increase the costs of transacting insurance because the uncertainties involved. That is, restricting recovery to contractual relational loss will not address the relevant practical concerns.²⁸⁴

In *Candlewood*, the claimant was the time-charterer of a ship. Under the charter arrangement, the risk of loss or damage to the ship was in the other party. The ship was damaged as a result of the defendant's negligence but the claimant was required to pay for the charter while the vessel was under repair and lost certain profits. Losses were claimed. The Privy Council noted that the time-charterer had no proprietary or possessory interest in the vessel. The interest was merely in the contract itself. The fact that the claimant did not get what it bargained for under the contract did not mean that it could sue the defendant. The contract of hire was not with the defendant. Their Lordships held that, in any case where a defendant damaged physical property, judicial expedience dictated that the range of possible liability had to end somewhere. Otherwise there might be claims by all persons the delivery of whose goods might be delayed by a collision. This would open up an exceedingly wide new range of liability.²⁸⁵ Some limit or control mechanism had to be imposed on the liability of a wrongdoer towards those who have suffered economic damage in consequence of his negligence.²⁸⁶

In the words of Lord Fraser:

The plaintiff's argument, if accepted, would have far-reaching consequences, which would run counter to the accepted policy of the law. If claims for economic loss by sub-charterers are to be admitted, why not also claims by any person with a contractual interest in any goods being carried in the damaged vessel, and by any passenger in her, who suffers economic loss by reason of the delay attributable to the collision? An exceedingly wide, new range of liability would open up.²⁸⁷

His Lordship described the relational exclusionary rule as *a pragmatic one dictated by necessity*.²⁸⁸ In other words, in order to avoid the creation of a rule of law whereby a person who damages another person's property can be held liable, not only to that person, but also to

²⁸² Christian Witting, 'Compensation for pure economic loss from a common lawyer's perspective.' In van Boom, Koziol and Witting (Eds) *Pure economic loss* (2004) 126.

²⁸³ [1986] 1 A.C. 1.

²⁸⁴ Feldthusen, above n 2, 224.

²⁸⁵ At 19.

²⁸⁶ At 25.

²⁸⁷ At 19.

²⁸⁸ At 16.

all third parties for all of the consequences of that damage, the common law developed an exclusionary rule to limit the scope of the defendant's duty of care in this type of case to the person or property directly injured.²⁸⁹

The case was preceded by the authority of *La Société Anonyme de Remorquage à Hélice v Bennetts*²⁹⁰ where the plaintiffs unsuccessfully sued to recover from the defendant as damages the amount of towage remuneration which they would have earned if they had completed the towage contract. The contract came to an end when a steam tug belonging to the plaintiffs came into collision with the defendant's steamship under tow, the collision resulting from the negligence of the defendant's servants. No damage was caused to the tug or its equipment by the collision.

In *Leigh & Sullivan Ltd. v Aliakmon Shipping Co. Ltd.*²⁹¹ the question was whether the plaintiff, who had a contractual right to certain goods, were owed a tortious duty, which would sound in damages, where the goods were damaged in transit at sea.

The House of Lords reaffirmed the notion that in order to enable a person to claim in negligence for loss caused to him by reason of loss or damage to property, he must have had either the legal ownership of or a possessory title to property concerned at the time when the loss or damaged occurred. Contractual rights to the property are not enough if the buyer is to sue in negligence.

The plaintiff argued that a claim in negligence should be open to buyers who were, prospectively, though not presently, legal owners of the property concerned. The House could see no reason why this would represent an exception to the consolidated authority of no recovery. Lord Brandon said that there is a long line of authority for a principle of law that, in order to enable a person to claim in negligence for loss caused to him by reason of loss of or damage to property, he must have had either the legal ownership or a possessory title to the property concerned at the time when the loss or damage occurred, and it is not enough to have had only contractual rights in relation to such property.²⁹²

In a very powerful article, Markesinis submits that this is a remarkable declaration to the effect that however questionable a legal rule may be, however much the circumstances

²⁸⁹ Peter Cane doubts the validity of the indeterminacy argument. His view is that the indeterminacy problem is not unique to economic loss cases as a class (although it may be more common and acute in that class of case); and so, at bottom, the crux of the argument seems to be that economic interests are less worthy of the law's protection than physical interests. Cane, above n 84, 456.

²⁹⁰ [1911] 1 K.B. 243.

²⁹¹ [1986] 2 W.L.R. 902.

²⁹² At 914.

may have changed since its inception, it must remain fossilised and immutable.²⁹³ He proceeds by criticising Lord Brandon, who stated that ‘the rule [he likes] is simple to understand and easy to follow.’²⁹⁴ If a rule is bad or inappropriate, says Markesinis, should it still be applied just because ‘it is simple to understand and easy to follow’?²⁹⁵

Clarke suggests two reasons to put that judgment into question. (a) The principle of no recovery is based on the fear of floods of litigants, but this seems unlikely. (b) It is odd, he says, that one rule (insurable interest) allows the CIF buyer to protect his interest in the goods by contracting insurance, but another rule, denies him (and his insurer) a tort action against the person who does the damage. It is particularly odd, he concludes, in so far as both rules are rules of public policy designed to draw clear lines between interests that merit protection by the law and interests that do not.²⁹⁶

The same author points out another inconsistency. The buyer may wonder, he says, why the lender who has security on goods, but then finds that the carrier has wrongfully delivered them to the borrower, can sue the carrier in conversion (see *The Jag Shakti* [1986] A.C. 337). The buyer may also wonder why he can sue the carrier who is careless on delivery, but not the carrier who is careless on stowage.²⁹⁷ On a similar line of argument, Cane asks why should purely economic loss be irrecoverable if consequent on damage to the property of a third party, but recoverable in certain circumstances if unrelated in any way to property damage?²⁹⁸

Markesinis suggests that *The Aliakmon* is not, in itself, a leading case. He submits that the case was used as a medium to bring some order to the post-*Junior Books* chaos in the area of pure economic loss, but that the choice could not have been more unfortunate. He concludes that the attempt to return the law to the days when economic loss was never compensated unless it accompanied personal injury or damage to property is also very unfortunate.²⁹⁹

The anomalies in the area of economic losses have always been subject of particular remarks from commentators. The classical theory allowed the recovery of economic losses

²⁹³ ‘The imaginative versus the faint-hearted: economic loss still in a state of chaos.’ (1986) 45 *Cambridge Law Journal*, 384, 385.

²⁹⁴ At 914.

²⁹⁵ Markesinis, above n 248, 385.

²⁹⁶ Malcom Clarke, ‘Buyer fails to recover economic loss from the negligent carrier.’ (1986) 45 *Cambridge Law Journal*, 382, 383.

²⁹⁷ Markesinis, above n 248, 384.

²⁹⁸ Peter Cane, ‘Economic loss in tort: is the pendulum out of control?’ (1989) 52 *Modern Law Review*, 200, 213-214.

²⁹⁹ Markesinis, above n 248, 384.

consequential on physical damage to a person or his property, but did not allow the recovery of *pure* economic losses; that is, those arising independently of any physical damage or those arising in consequence of damage to a third party's property. Stanton³⁰⁰ points out how generations of law students have been forced to grapple with the facts in *Spartan Steel & Alloys Ltd v Martin & Co. (Contractors) Ltd*.³⁰¹

In that case, the defendant's employees negligently damaged an underground electricity cable, whilst digging up a road. As a result, the power supply to the claimants' factory was interrupted for more than half a day. During the time it took to restore the power, the claimants had had to pour the molten metal out of their furnace to prevent the metal solidifying and damaging it.

The plaintiff claimed to have suffered three types of injury: property damage, consequential economic loss and pure economic loss. First, when the furnaces went off, the molten metal in the process of production solidified prematurely and, although it had managed to reclaim the steel that was being cast when the power went off, it had recovered it in a way that meant that it was worth less than what was paid for it. In addition, the plaintiff had suffered consequential economic loss in respect of the profit that would have been realized had the melt been completed and sold. In the third place, in the absence of electricity the plaintiff was unable to produce four other melts which it would have produced in the ordinary course of events.

The plaintiff's claim, under three different heads were:

- (a) £368 for the reduction in value of the metal in the furnace at the time the electricity supplied failed;
- (b) £400 for the profit which the plaintiff would have made if that particular melt had been properly completed;
- (c) £1,767 for loss of profit on four further melts which could have been put through the furnace during the period when the power was cut off.

The Court of Appeal allowed the recovery of the loss in value from the metal that could not be kept hot enough to use further, and the loss of profit on that metal, but not the further loss claimed from the production that would have taken place while the power was cut.

³⁰⁰ K. M. Stanton, 'The recovery of pure economic loss in tort: the current issues of debate.' in Michael Furmston (ed), *The law of Torts* (1986) 10.

³⁰¹ [1973] Q.B. 27.

Lord Denning repudiated the doctrine of ‘parasitic damages’, for it conveyed the idea of damages which ought not in justice to be awarded, but which somehow had been allowed to get through by hanging on to others. He maintained that the question of recovering economic loss was one of pure policy.³⁰²

‘The more I think about these cases, the more difficult I find it to put each into its proper pigeon-hole. Sometimes I say: ‘there was no duty’. In other I say: ‘The damage was too remote’. So much so that I think the time has come to discard those tests which have proved so elusive. It seems to me better to consider the particular relationship in hand, and see whether or not, as a matter of policy, economic loss should be recoverable.’³⁰³

Lord Denning’s approach was criticized by Stephen J. in *Caltex* because of the great uncertainty that would result in the law if the sole criterion for recovery of economic loss was to be ‘a matter of policy’ determined by the individual judge. He said that to apply generalized policy considerations directly, in each case, instead of formulating principles from policy and applying those principles, derived from policy, to the case in hand, was to invite uncertainty and judicial diversity.³⁰⁴

The House of Lords during a short period also has cast considerable doubt on the appropriateness of employing policy considerations in legal reasoning.³⁰⁵ In *McLoughlin v O’Brian*³⁰⁶, for instance, Lord Scarman regarded policy considerations as being non-justiciable and Lord Roskill in *Junior Books* said that, although it cannot be denied that policy considerations have from time to time been allowed to play their part in the tort of negligence, its scope is best determined by considerations of principle rather than of policy...³⁰⁷

In any event, the first loss was characterised as a physical loss. The loss of profit on that melt was considered economic loss ‘truly consequential on the physical damage’³⁰⁸ or the ‘immediate consequence’³⁰⁹ of the material damage and, therefore, recoverable because it

³⁰² He took five considerations into account: the special position of statutory undertakers, the nature of the hazard, the floodgates argument, the desirability of loss spreading over loss fixing and that the law provides for deserving cases. For further policy considerations, see: Symmons, ‘The duty of care in negligence: Recently expressed policy elements’ (1971) 34 *Modern Law Review*, 394, 528 and Stevens, ‘Negligent acts causing pure financial loss: policy factors at work’ (1973) 23 *University of Toronto Law Journal*, 431.

³⁰³ Winfield suggests that Lord Denning’s hesitation disappears when it is recognised that D may owe P a duty with respect to loss ‘A’ but not loss ‘B’. Winfield & Jolowics, above n 246, 134.

³⁰⁴ (1976) 136 C.L.R. 529.

³⁰⁵ MacGrath, above n 247, 355.

³⁰⁶ [1983] AC 410.

³⁰⁷ [1983] AC 520, 539. Mac Grath advises to stay away from both extremes for, on the one hand, to deny the role of policy is naive; while on the other, the application of blanket policy considerations regardless of legal principles leaves much to the discretion of the individual judge, above n 247, 355.

³⁰⁸ Per Lord Denning at 39.

³⁰⁹ Per Lawton L.J. at 47.

had piggybacked on to the physical damage. The third head of claim was rejected because it consisted of economic loss independent of the physical damage (pure economic loss).

Smith has said that statements that classify losses as an immediate or direct consequence without producing a criteria for the decision (when is direct or when is indirect or when it is directly consequential) is only a conclusion, and not the reason for reaching it . Therefore, he submits that physical damage is only relevant when it can take the place of a special relationship in setting limits to recovery. The physical damage must in itself be recoverable. Physical damage which is in itself too remote cannot serve as a limiting factor. It must limit recovery to a limited class, a limited amount, arising within a specifiable time. If the economic loss is such that other people could suffer the same kind of economic loss without the presence of any physical damage, then it cannot be a relevant factor in setting limits on recovery. This explains why the presence of physical damage in *Spartan Steel* was not sufficient to allow recovery. The same kind of loss of profits could have been suffered by a firm not having any physical damage resulting from the loss of power. The link between the physical damage and the economic loss must be such that only people suffering that kind of physical damage can suffer that kind of economic loss. In other words, the physical damage must be a necessary condition for the suffering of the economic loss. Only then the economic loss will be limited in such a way as not to be too remote.³¹⁰

Dissenting, Edmund-Davies L.J. felt unable to draw a distinction between loss of profits, resulting from being unable to complete the processing of materials and loss of profits resulting from being unable to carry out the process at all, since both were equally foreseeable and equally the direct consequences of the defendant's negligence. He would have imposed responsibility for an economic loss provided that it is a reasonably foreseeable and direct consequence of failure in a duty of care.³¹¹

2.2.3 Relational loss in other common law jurisdictions.

(a) Australia.

³¹⁰ J. C. Smith, 'Clarification of duty – Remoteness problems through a new physiology of negligence: economic loss, a test case.' (1974) 9 *University of British Columbia Law Review*, 213, 238.

³¹¹ At 46. In *Junior Books Ltd. V Veitchi* [1982] All E.R. 201 (H.L.), Lord Roskill doubted *Spartan Steel* and felt it should be considered afresh to see whether Edmund-Davis L.J. dissent should be preferred.

Departing from the exclusionary rule, a wider approach was taken by the High Court of Australia in *Caltex Oil (Australia) Pty. Ltd. v The Dredge Willemstead*³¹² and *Perre v Apand Pty. Ltd.*³¹³

In *Caltex* the defendant, while dredging a shipping channel, negligently broke an underwater pipeline that carried petroleum products from the Australia Oil Refinery (AOR) to the plaintiff's oil terminal. Caltex, which distributed crude oil from the refinery by means of the pipeline, which belonged to AOR, not to the plaintiff, sued for the additional costs of transporting oil to the terminal by ship and road while the pipeline was being repaired.

Although the trial judge dismissed the action, the High Court of Australia refused to apply the exclusionary rule and allowed Caltex to recover this purely economic loss. Four members of the Court agreed that application of the normal *Donoghue* principle to purely economic loss would raise problems of indeterminate liability, and each attempted to formulate a more limited test for recovery of economic loss.

It is not easy to extract any clear ratio from the four judgments, but the tests formulated by Gibbs J. and Mason J. being in similar terms have been cited as the dominate one.³¹⁴ According to it, a defendant will be liable for purely economic loss if he knew or ought to have known that the plaintiff as a 'specific individual' rather than merely as a member of a 'general'³¹⁵ or 'unascertained'³¹⁶ class of persons, would be likely to suffer economic loss as a consequence of his negligent conduct.

Markesinis points out that this deals with the problem of indeterminate liability, and could have led to a different result in *Spartan Steel* if the plaintiff had been the only user affected by the rupture of the cable. However, he says, the 'known plaintiff' exception, in general, creates the paradox that the more extensive the harm caused by the defendant, the less likely he is to be liable.³¹⁷

The test has provoked different opinions. MacGrath thinks that, to a certain extent, it has striven in one way or another to achieve an administratively manageable balance between the desire to compensate the innocent plaintiff and the reluctance to subject the inadvertent defendant to an inordinate liability which is punitive in effect.³¹⁸ He recognizes, though, the

³¹² (1976) 136 C.L.R. 529.

³¹³ (1999) 198 C.L.R. 180.

³¹⁴ Graham B. Roberts, 'More thoughts on Caltex: Candlewood Navigation Corporation Ltd. v Mitsui Osk Lines Ltd. & another' (1986) 12 *Monash University Law Review*, 27, 29.

³¹⁵ Per Mason J. at 593.

³¹⁶ Per Gibbs J. at 555.

³¹⁷ Markesinis, above n 248, 112.

³¹⁸ MacGrath, above n 247, 358.

difficulty of translating the rather vague concept of proximity into manageable practical rules which will afford the public some means of 'predetermining their liability or freedom therefrom'.³¹⁹

It has been submitted that the test is deficient in two aspects: a) the uncertain nature of the test will give rise to serious practical difficulties in its application to new fact situations and creates the potential for a very wide ambit of liability; b) it prevents efficient distribution of economic loss without attracting any significant advantages in terms of deterrence and loss prevention. The decision will have little deterrent effect.³²⁰

After the judgment of *Candlewood Navigation* by the Privy Council, Roberts thought that Australian State Courts had to assess the degree, if any, to which the Gibbs/Mason ratio had been weakened.³²¹

Hogg believes the test of liability imposed by the High Court was very narrow. Not only has the defendant to have the knowledge or means of knowledge of the plaintiff as a specific individual, she says, but also other additional features are required which could be put either in terms of the physical proximity between the plaintiff's property and the property of the third party which was damaged, or in terms of the joint or common venture in which the third party and the plaintiff were engaged.³²²

Cane, however, suggests that the distinction between expenses incurred and benefits not received is not as strong analytically as Professor Hayes maintains, and also that it imposes an unnecessary limitation on recovery for purely economic loss if one accepts the 'specific' or 'individual' foreseeability test proposed by Gibbs and Mason J.J.³²³

The Privy Council in *Candlewood Navigation* refused to adopt the approach in *Caltex*. However, in *Perre v Apand Pty Ltd.*³²⁴ none of the members of the High Court suggested that *Caltex* was wrongly decided and two of them (McHugh and Hayne JJ) expressly approved it. Canada did not welcome it either but some lower courts in New Zealand decided to follow it.³²⁵

³¹⁹ Idem.

³²⁰ J.A. Smillie, 'Negligence and economic loss'. (1982) 32 *University of Toronto Law Journal*, 251.

³²¹ Roberts, above n 314, 33.

³²² Karen Hogg, Negligence and economic loss in England, Australia, Canada and New Zealand. (1994) 43 *International and Comparative Law Quarterly* 125. Robert Hayes. 'The duty of care and liability for pure economic loss' (1977-1980) 12 *Melbourne University Law Review* 79.

³²³ Peter Cane, 'Economic loss and the tort of negligence' (1979-1980) 12 *Melbourne University Law Review* 408.

³²⁴ [1999] 73 *Australia Law Journal* 1190

³²⁵ *New Zealand Forest Products Ltd. v A.G.* [1986] 1 N.Z.L.R. 14 (H.C.) The case was identical to *Spartan Steel*. Barker J. considered the English authority, particularly the reasoning of Denning LJ very closely, but

(b) Canada.

Canada has expressed a greater willingness to allow recovery for pure economic loss than courts in the United Kingdom and the United States. However, the unfortunate lack of unanimity in the reasoning of the Supreme Court with respect to the fate of the exclusionary rule and differences of opinion made it hard to identify how far that rule was to be relaxed and the issue was not unequivocally settled until 1997.

In *Canadian National Railway Co. v Norsk Pacific Steamship Co, The 'Jervis Crown'*³²⁶ a barge collided with a bridge owned by the federal government and managed by Public Works Canada. As a result of the accident, which caused extensive damage to the bridge, it was closed for several weeks. The bridge carried a railway track that served mainly the plaintiff, who had to reroute traffic while the bridge was closed. In addition to the Crown's claim for damage caused to the bridge, three railway companies, who had a contractual right to use the bridge, sued the owner of the tug for economic losses which they suffered as a result of not being able to use it. The lower courts allowed these claims and the case went to the Supreme Court of Canada.

The Supreme Court held, by a narrow majority that the exclusionary rule was not part of Canadian law. The decision confirmed what was already apparent, that is, that the Supreme Court was not inclined to follow the English courts' lead and reaffirmed the traditional approach. The judgment provided a comprehensive survey of relevant issues, however, contrary approaches split three ways within the majority which made it difficult to discern a clear *ratio* and the state of the law remained obscure. McLachlin J delivered the main majority judgment. (L'Heureux-Dubé and Cory JJ concurring) The dissent was delivered by La Forest J (Sopinka and Iacobucci JJ concurring). The seventh Justice, Stevenson J. disagreed with the reasoning in both judgments favouring the liability to a 'known plaintiff' rule derived from *Caltex*. This test was clearly satisfied on the facts of the case since Norsk had actual knowledge of the use which CNR made of the bridge.

McLachlin J, began her approach saying that the case required the Court to confront squarely the vexed question of the extent to which damages for pure economic loss may be recovered in tort at common law. After reviewing the developments in other jurisdictions, her Honour identified two different approaches to the problem of defining the legal parameters of

nevertheless found the views expressed by the dissenting Edmund Davies LJ totally convincing. He also drew support from the developments since *Spartan Steel* including *Caltex* and *Junior Books*.

³²⁶ [1992] 1 S.C.R. 1021.

common law rules: the bright-line exclusionary approach as applied in *Murphy*; and the proximity based, case-by-case approach as applied in *Anns*. Her Honour essentially adopted the *Anns* test,³²⁷ stating that the incremental approach to the problem of determining the limits for the recovery of pure economic loss which had been previously adopted by the Supreme Court in *Kamloops*³²⁸ should be confirmed.³²⁹ She stated that proximity was the controlling concept which avoids the spectre of unlimited liability. The requirement of a relationship of proximity, however, was not considered the ultimate determinant of liability. Her Honour saw proximity as a necessary but not sufficient condition of liability which can be negated by policy. She remarked that proximity was not a test but a broad concept capable of subsuming different categories, an umbrella covering a number of disparate circumstances in which the relationship between the parties is so close that it is just and reasonable to permit recovery in tort. McLachlin J thought that the complexity and diversity of the circumstances in which tort liability may arise defy identification of a single criterion capable of serving as the universal hallmark of liability.

Having established this framework and applying it to the facts, her Honour found that there was sufficient proximity on a number of factors related to Canadian National Railways' connection with the property damaged: (a) the plaintiff users of the bridge were parties physically threatened by the tugboat owner's negligence, being frequent users of the bridge; (b) the plaintiff's property was in close proximity to the bridge; (c) CNR's property could not be enjoyed without the link of the bridge, which was an integral part of its railway system; (d) CNR supplied materials, inspection and consulting services for the bridge; (e) the plaintiff was the preponderant user of the bridge. She concluded that CNR's obligations to Canada brought their relationship into the joint venture category recognised in such cases as *Greystoke*. As there were no overwhelming policy reasons to deny recovery, CNR was entitled to recover. Finally, McLachlin J characterised her approach as fair and flexible, unfettered by absolute rules based on different categories of loss.

La Forest J presented a judgment entirely inconsistent with a general theory approach distinguishing his approach to limiting liability from McLachlin J's from the outset. Instead of treating all economic loss as a homogenous group, his Honour was concerned to deal with the peculiarities of relational economic loss. His Honour said that the issue was not whether

³²⁷ Basil Markesinis, 'Compensation for negligently inflicted pure economic loss: some Canadian views'. (1993) 109 *Law Quarterly Review*, 5, 7.

³²⁸ In *Kamloops (City) v Nielsen* (1984) 10 D.L.R.(4th) 641, a case dealing with the liability of a public authority for the economic loss brought about by its failure to exercise its statutory powers, the Supreme Court choose to follow the path chartered by Lord Wilberforce in *Anns*.

³²⁹ At 368.

economic losses are recoverable in tort (which they are indeed in certain cases). The issue, rather, was whether a person who contracts for the use of property belonging to another can sue another who damages that property for losses resulting from his or her inability to use the property during the period of repair. In taking this approach, *La Forest J* acknowledged his debt to the work of Feldthusen who argued that all economic loss is not identical and can be divided up into five distinct categories, each presenting unique policy considerations. *La Forest J* adopts Feldthusen's argument that the fifth category – (contractual) relational economic loss – should be barred by an exclusionary rule. This is because of the important differences between contractual relational economic loss and other pure economic loss. He stated that a distinct approach to contractual relational economic loss cases was justified both on policy grounds and on precedent. In policy terms, contractual economic loss cases have a number of specific characteristics that differentiate them from other pure economic loss cases. First, the property owner's right of action already puts pressure on the defendants to act with care. Imposing further liability cannot reasonably be justified on the grounds of deterrence. Second, a firm exclusionary rule does not necessarily exclude compensation to the plaintiff for his or her loss. Rather, it simply channels to the property owner both potential liability to the plaintiff and the right of recovery against the tortfeasor. Third, perfect compensation in these cases is almost always impossible because of the ripple effects which are of the very essence of contractual relational economic loss. These effects are often absent in other economic loss cases. It is in this sense that the solution to cases of this type is necessarily pragmatic: the whole exercise in this kind of situation involves drawing a line amongst those who are undeniably injured by the tortfeasor who was undeniably at fault. Fourth, contractual relational economic loss cases, typically, involve accidents, an aspect of fundamental importance with respect to tests of liability founded on the foreseeability of an individual plaintiff or an ascertained class of plaintiffs. Applying the exclusionary rule to CNR's claim, *La Forest J* identified an exception for joint venture cases. However his Honour did not think that CNR was engaged in a joint venture with Canada because under the contract, CNR was not required to contribute to Canada's loss. *La Forest J* also rejected CNR's argument that it had an alternative interest in the bridge by virtue of the 'transferred loss' doctrine. He held that such loss only occurs where the risk of property damage has passed, but the right to the property has not. CNR's loss was not transferred because it never assumed the risk of property damage. It followed that CNR had nothing more than a contractual right to use the bridge. Finally his Honour examined CNR's alternative means of protection. He concluded that CNR was clearly in the best position to guard against the loss it

suffered. La Forest J observed that both CNR and Canada were sophisticated contracting parties; well aware of the risk of bridge failure and the losses this could cause CNR and held that CNR should have built the price of insurance for loss into its contract with Canada.

Summarizing, it could be said that McLachlin J adopted an *Anns*-style test as the mechanism for controlling indeterminate liability. The touchstone of this was the concept of proximity. McLachlin J explicitly rejected strict rules based on different types of damage. La Forest J, by contrast, isolated relational loss from other sorts of claims, and exhibited a pragmatic preference for certainty in decision making.³³⁰ He considered proximity a formulation too vague to offer any assistance to a presiding judge. His control mechanism was based on the type of damage suffered. However, not only did his Honour embrace the physical/economic damage distinction underlying the exclusionary rule, he made it far more sophisticated. La Forest J's entire approach was concerned with breaking economic loss itself into different subsets which further regulate recovery.

In *Bow Valley Huskey (Bermuda)* the Supreme Court took the opportunity to clear up the uncertainty created by its decision in *Norsk*. Two companies named Husky Oil and Bow Valley decided to pursue a drilling opportunity off the coast of Canada. One of Bow Valley's subsidiaries therefore contracted with Saint John Shipbuilding for the construction of a drilling rig. In order to take advantage of offshore financing Husky and Bow Valley incorporated an offshore company, Bow Valley Husky Ltd ("BVH"), to which they transferred ownership of the rig before construction began. Husky and Bow Valley then entered into four year leases of the rig for drilling. These required that they pay BVH day rates even in the event that the rig was out of service. Due to negligence by both Saint John and BVH a fire broke out on the rig and it was out of service for several months. Husky and Bow Valley sued for their wasted hire costs as well as additional expenses including food and equipment costs.

As lessors using the rig, Husky and Bow Valley might ordinarily have recovered under the exclusionary rule as having a possessory interest in the rig. However, it was common ground that, under maritime law concepts, these particular leases did not give possession. All they gave Husky and Bow Valley was a contractual right to services from BVH, which supplied both the rig and (indirectly through a separate entity which ran the rig operations) the workers. The duty in issue was not a simply duty not to damage the bridge, but a duty to inform the rig's owner of the fact that a cladding used as a component of the rig

³³⁰ Feldthusen, above n 2, 196.

was flammable. An appropriate warning would have alerted the rig's owner of the need to install a ground fault breaker system that would have prevented a fire started by an electrical fault. It was the spread of this fire that led to the rig's damage.

The Court held unanimously that the claim should fail. Applying the two-stage test of duty, the Supreme Court held that users of the rig such as the plaintiffs were foreseeable victims if a fire damaged the rig, and thus were owed a *prima facie* duty of care. Moving on to the second stage, that of policy, the Court held that to impose a duty on the defendants would be to create a problem of an indeterminate liability. The lead judgment was delivered by McLachlin J with La Forest J concurring. Her analysis of the contractual relational economic loss issue in the case is also accepted by the other judgment, delivered by Iacobucci J (Gonthier, Cory and Major JJ concurring). The judgment puts an end to the uncertainty created in *Norsk*. The decision is clear and allows recovery in limited, identifiable sets of exceptional circumstances, identified by La Forest J as (a) cases of 'transferred loss'; (b) cases where there was a common adventure between the claimant and the property owner and (c) shipping cases involving the law of general average. The Court refused to grant recovery on any arbitrary case-by-case basis, such as might have been encouraged in the past on one reading of *Norsk*.

Feldthusen, while in agreement with the result in *Bow Valley* is critical of the reasoning that led to it. He argues that the case should have been resolved at stage one of the two-stage test. The duty to warn of the flammability of the rig was owed only to its owner, who was the party capable of taking preventive measures to avert the fire hazard. According to him, there was no *prima facie* duty to warn users.³³¹ In support of the Supreme Courts' approach Klar argues that the question was not whether the defendants owed a duty to warn the plaintiff's, but whether the duty to warn the rig's owner could be extended so as to protect other users as well. He submits that McLachlin J's argument was that the owners had a *prima facie* duty of care to all foreseeable victims to either manufacture the rig competently, or to issue warnings to the appropriate persons, and that these foreseeable victims included the rig's users.³³²

³³¹ Bruce Feldthusen, 'Liability for pure economic loss: yes, but why?' (1999) 28 *University of Western Australia Law Review*, 84, 104.

³³² Lewis Klar, *Tort Law*, 2003, 246.

2.3 Defective products or building structures.

2.3.1 Generally.

In the 70's, during the era of expansionism of the tort of negligence that culminated in *Anns v Merton London Borough Council*,³³³ in areas of the law where the old reasons for denying liability no longer seemed to apply, or where the old reasons had never been very clear, plaintiff's lawyers thought that it would be worthwhile trying to obtain a favourable result in cases in which previously they would not have bothered. One of those areas was pure economic loss, or in particular economic loss is in relation to defective products or defective premises.³³⁴

The main issue here is trying to determine whether a builder is liable in tort to a subsequent purchaser of a building with whom the builder is not in contractual privity, for the cost of repairing defects arising out of negligent construction.

Martin submits that, as in the early development of negligence law pure economic loss was considered unrecoverable; it is not surprising that the first recognition of liability, for building defects was premised on the categorization of the defects as a material physical damage.³³⁵ In *Dutton v Bognor Regis Urban District Council*³³⁶ the Court of Appeal held that a house damaged because it had been built on a rubbish tip constituted a physical injury, and damages were thus recoverable under the foreseeability principles of *Donoghue v Stevenson*.³³⁷ So, what in fact constituted an economic loss claim was characterized as physical damage. The Court of Appeal, in the desire to impose liability on the Council ended up blurring the issue.³³⁸

Counsel for the defendants argued that, although the Council might be liable if the ceiling fell down and injured a visitor, they would not be liable simply because the house was diminished in value. In a famous passage, Lord Denning M.R. responded:³³⁹

³³³ [1978] A.C. 728.

³³⁴ David Howarth, above n 128, 29.

³³⁵ Robyn Martin, 'Defective premises-the Empire strikes back' (1996) 59 *Modern Law Review*, 116, 117.

³³⁶ [1972] 1 Q.B. 373.

³³⁷ [1932] AC 562, [1932] All ER 1 (HL).

³³⁸ Marianne Giles and Erika Szyszczak, 'Negligence and defective buildings: demolishing the foundation of *Anns*? (1991) 11 *Legal Studies*, 85, 90. Following *Dutton v Bognor Regis UDC*, *Anns* characterized the plaintiff loss as 'material, physical damage' even though Lord Denning had, extra judicially, in *The discipline of the Law* (1997) 255-261, made it clear that this was a mis-description –presumably to help a 'deserving' plaintiff. Basil S. Markesinis and Simon Deakin, 'The random element of their Lordships' infallible judgment: an economic and comparative analysis of the tort of negligence from *Anns* to *Murphy*. (1992) 55 *Modern Law Review* 619, 621.

³³⁹ At 396.

I cannot accept this submission. The damage done here was not solely economic loss. It was physical damage to the house. If Mr. Tapp's submission were right, it would mean that if the inspector negligently passes the house as properly built and it collapses and injures a person, the council are liable: but if the owner discovers the defect in time to repair it –and he does repair it– the council are not liable. That is an impossible distinction. They are liable in either case.

Certainly, the economic loss which results directly from the avoidance of threatened physical harm demands recovery no less than when the physical harm materializes. The majority in *Bryan v Maloney*³⁴⁰ recognized this saying that:

It is difficult to see why, as a matter of principle, policy or common sense, a negligent builder should be liable for ordinary physical injury caused to any person or to other property by reason of the collapse of a building by reason of inadequacy of the foundations but be not liable to the owner of the building for the cost of remedial work necessary to remedy that inadequacy and to avert such damage!

A few years later, *Dutton* was affirmed by the House of Lords in *Anns v Merton London Borough Council*³⁴¹ but limited by a new test. The loss recoverable was the amount of expenditure necessary 'to restore the dwelling to a condition in which it is no longer a danger to health and safety of persons occupying and possibly (depending upon the circumstances) expenses arising from necessary displacement...'³⁴²

Hayes suggests that to a sympathetic onlooker, this test could be seen as a valiant attempt to balance two opposing forces. On the one hand, there was a need to limit tort claims in this type of situation, whilst on the other there was the desire to provide a remedy in compelling circumstances. The net result, he says, was that, under *Anns*, a plaintiff could bring a successful claim if he could show that there was an 'imminent danger' to his health and safety due to the defective condition of the building.³⁴³

Cane believes that was sensible. He reasons that, if a personal injury or physical damage to other property occurred as a result of the defect, the injured person or the owner of the damaged property would be entitled to recover damages in tort against a person whose negligence caused the defect. In the case of personal injury, he says, prevention is certainly preferable to an award of damages for injury which has occurred; and in case of damage to property, it is economically wiser to spend X now to avoid the need to spend X later plus pay damages for the cost of repairing the other damaged property.³⁴⁴ There is no doubt that, as a matter of policy, the law should provide incentives for the plaintiff to mitigate the danger of

³⁴⁰ (1995) 128 *Australian Law Report* at 173.

³⁴¹ [1978] A.C. 728.

³⁴² [1978] A.C. 728 per Lord Wilberforce at 759.

³⁴³ John A. Hayes, 'After Murphy: Building on the consumer protection principle' (1992) 12 *Oxford Journal of Legal Studies*, 112, 114.

³⁴⁴ Cane, above n 298, 206.

the defect in order to further both the goals of accident prevention and economic efficiency. In that sense, it has been said that the builder should not be ‘insulated’ from liability because of the current owner’s mitigation of the danger which the builder negligently created in the first place.³⁴⁵

Harris refers to two capricious distinctions contained in Lord Wilberforce’s speech. First, he says, the categorization of the damage as material or physical implied that a latent defect must have manifested itself in some way –through cracking or the like. This was capricious, he suggests, for it would mean that if potential danger were discovered through a survey without there being such physical manifestations there would be no liability. Secondly, he believes that the reference to the danger to health or safety as being ‘present’ or ‘imminent’ was also capricious for it would mean no recovery if a latent defect was discovered posing danger only in the distant future, and no recovery if a building actually collapsed without injuring anyone.³⁴⁶ A similar argument was developed by Lord Bridge in *Murphy v Brentwood*³⁴⁷, who maintained that a requirement of imminent danger to persons or other property raised the difficult problem of the deteriorating product which is not yet a danger, but which will become one with time and with increasingly expensive repair costs.³⁴⁸

Hayes points out that the test required the law to draw a line between resident and non-resident owners, since the latter could not legitimately claim that there was any danger to their health and safety.³⁴⁹ He also adds that the situation which arose in *Department of the Environment v Thomas Bates & Son*³⁵⁰ suggested that the test required a distinction to be drawn between a static situation, where no danger would exist unless the plaintiffs acted in a way which would create such a danger, and a situation in which the internal defects in the structure were themselves sufficient to create a danger.³⁵¹

³⁴⁵ *Winnipeg Condominium Corporation No 37 v Bird Construction Co.* (1995) 121 *Dominion Law Reports* (4th) at 214.

³⁴⁶ J.W.Harris, ‘Murphy makes it eight –Overruling comes to Negligence’ (1991) 11 *Oxford Journal of Legal Studies*, 416, 420.

³⁴⁷ [1991] 1 A.C. 390.

³⁴⁸ At 929.

³⁴⁹ This was a point first raised by Lord Keith. In his long campaign against *Anns*, initiated in *Governors of Peabody Donation Fund v Sir Lindsay Parkinson & Co. Ltd.* [1985] A.C. 210 at 242. His Lordship had difficulty in seeing how a non-resident owner could fall within it, as he would not be subject to any possible injury to health. Therefore, he thought *Anns* should be restricted solely to claims by owners/occupiers. Lord Keith was joined in his campaign by Lord Brandon, who managed to transform his lonely dissent in the pro-*Anns* case, *Junior Books*, into a unanimously approved opinion of the court in *The Aliakmon*, an anti-*Anns* case. Howarth, above n 128, 59.

³⁵⁰ [1989] 1 All E.R. 1075, C.A.

³⁵¹ John A. Hayes, above n 343, 115.

In any event, the fact that the relevant damage was classified as ‘material, physical damage’, led to a straightforward application of *Donoghue v Stevenson*.³⁵² Stychin suggests that recovery could properly be justified on a different basis, as a *less* straightforward application of *Donoghue v Stevenson*, but unfortunately Lord Wilberforce failed to take that path, paving the way for the House of Lords to repudiate both the approach and the result.³⁵³

An even bolder step, allowing recovery without risk of injury to health or other property, was taken in *Junior Books v Veitchi*,³⁵⁴ at the time, an important decision of the House of Lords, perceived by the House itself to constitute a significant change in the law.³⁵⁵

In that case, the defendants were engaged as sub-contractors to lay a floor in a factory being constructed by the principal contractors for the plaintiff. Two years later the floor began to crack needing to be replaced and the plaintiffs claimed that it was the result of the careless manner in which it had been laid. There was no allegation that the defects posed a threat to person or property. The plaintiff sought to recover the cost of replacing the floor; book storage costs; machinery relocation expenses; lost profits on the temporary closing of the factory; contractual liability to employees and investigation costs associated with the flooring replacement.

For some obscure reasons, the action was brought against the sub-contractors, with whom there was no contractual relationship, instead of against the builder for breach of contract.³⁵⁶

Martin suggests that the House of Lords took the ‘stich in time saves nine’ argument one stage further. It was better to repair premises even before they were allowed to become a threat to safety, and the law should encourage repair by compensating building owners for the repair costs.³⁵⁷ The damage was realistically categorised as pure economic loss.

The House of Lords decided, with Lord Brandon dissenting, that the plaintiff could in theory recover compensation for all these kind of losses in an action in tort. There was no requirement that the economic losses be linked to actual or potential personal injury, or damage to other property of the plaintiff.

³⁵² [1932] AC 562, [1932] All ER 1 (HL).

³⁵³ Carl F. Stychin, ‘Dangerous liasons: new developments in the law of defective premises’ (2006) 16 *Legal Studies* 396.

³⁵⁴ [1983] 1 A.C.520.

³⁵⁵ S. M. Waddams, ‘Tort liability for economic loss: Junior Books Ltd. v Veitchi Co. Ltd.’ (1983-1984) 8 *Canadian Business Law Journal*, 101.

³⁵⁶ The subject is a matter of speculation. It could be because the main contractor was insolvent, or because, though solvent, he could not be sued (for example because of an injudicious settlement or an architect’s Final certificate which could not in the circumstances be opened up). Furmston, above n 303, 2.

³⁵⁷ Roby Martin, ‘Tortious liability for defective premises in English law after *Murphy v Brentwood*: Learning from the Commonwealth.’ (1997) 2 *Newcastle Law Review*, 82, 86.

The test adopted to define the scope of the duty of care to avoid causing economic loss was Lord Wilberforce's in *Anns v Merton London Borough Council*. In doing so, their Lordships (at least four of them) made the strong affirmation that the scope of the duty of care in economic loss situations is to be determined by the same approach used in all other negligence cases. No longer were judges supposed to view economic loss claims more sceptically than other negligence claims, or apply a test which incorporated the assumption that economic losses were not to be recovered except in very special circumstances.³⁵⁸

The dissenting judgment of Lord Brandon was significant. Much of his argument concerned the boundaries between tort and contract and inroads into privity.

But *Junior Books* was short-lived. Doubts about the decision quickly began to be expressed culminating in its comprehensive rejection in *D & F Estates Ltd. v Church Commissioners for England*³⁵⁹ In a changing political and economic climate the case has been all but discredited in England, restricted to its narrow facts³⁶⁰, and its statements in *obiter dicta* not followed. It has been said that it is unlikely that the case will be regarded as authority for anything in England in future after its dismissal by the House of Lords in *Murphy*.³⁶¹

In *D & F Estates Ltd. v Church Commissioners for England*³⁶² the House of Lords retreated from (without overruling) *Junior Books*, denying recovery to a claim for pure economic loss arising out of a defect of quality which presented no danger to the health or safety of persons, or damage to other property. The return to orthodoxy that would culminate with *Murphy v Brentwood District Council*³⁶³ had begun. Contract remained the primary route for the recovery of pure economic loss: the law of negligence would rarely provide a substitute for the assistance of third parties or those whose contracts do not provide for recovery.³⁶⁴ It was considered that to recognize a duty would be to impose on the builders, for the benefit of those with whom they had no contractual relationship the obligation of one who

³⁵⁸ Gary Davis, 'Junior Book Ltd. v Veitchi Co. Ltd. Easing the right to recover for pure economic loss'. (1983-1984) 13 *University of Queensland Law Journal*. 84, 86.

³⁵⁹ [1989] AC 177 (HL). Todd, above n 4, 296. For full comments of this case, see I. N. Duncan Wallace, 'Negligence and defective buildings: confusion confounded?' (1989) *Law Quarterly Review* 105, 46, 78.

³⁶⁰ Judicial jargon for 'this case is wrong, but we do not have the courage to overrule or ignore it'. David Howarth, 'Negligence after Murphy: time to rethink' (1991) 50 *Cambridge Law Journal* 58, 87.

³⁶¹ Feldthusen, above n 2, 136. In *Simaan v Pilkington Ltd. n°2* [1998] Q.B. 758 Lord Justice Dillon doubted whether future citation of the case would be of any value. (at 784) In *D & F Estates*, Lord Bridge said that the case involved a unique albeit non-contractual relationship but laid down no general principle of the law of tort. [1989] A.C., however, points out that Lord Keith in *Murphy* seems to regard *Junior Books*' decision as within the well established principle of reliance-based liability exemplified by *Hedley Byrne*. Richard O'Dair, 'Murphy v Brentwood District Council: A house with firm foundations?' (1991) 54 *Modern Law Review*, 561.

³⁶² [1989] AC 177.

³⁶³ [1991] 1 A.C. 390.

³⁶⁴ *Salmond & Heuston on the Law of Torts* (20th edition, 1992) 212.

warranted the quality of the plaster ‘as regards materials, workmanship and fitness for purpose’.³⁶⁵

The previous view was flatly rejected by Lord Bridge:

‘If the hidden defect in the chattel is the cause of personal injury or of damage to property other than the chattel itself, the manufacturer is liable. But if the hidden defect is discovered before any such damage is caused, there is no longer any room for the application of the *Donoghue v Stevenson* principle. The chattel is now defective in quality, but is no longer dangerous. It may be valueless or it may be incapable of economic repair. In either case the economic loss is recoverable in contract by a buyer or hirer of the chattel entitled to the benefit of a relevant warranty of quality, but is not recoverable in tort by a remote buyer or hirer of the chattel.’

A theory not embraced with enthusiasm, (rather used as a possible explanation of *Anns*), which the House was at that stage unwilling to overrule without further arguments was the theory of the complex structure. According to this, it was arguable that in complex structures, or complex chattels, one part of a structure or chattel might, when it caused damage to another part of the same structure or chattel, be regarded in the law of torts as having caused damage to ‘other property’ for the purpose of the application of *Donoghue v Stevenson* principles.³⁶⁶ Thus, if owing to the defendant’s negligence, part A was defective and caused damage to part B, then the owner would not be regarded as having suffered economic loss. Rather he would have suffered damage to property within the principle of *Donoghue v Stevenson*.³⁶⁷

The theory was considered quite unrealistic and its limitations were later recognized in *Murphy*. When a house is built from the foundations upwards, a single integrated unit is created and it is an artificial argument to maintain that the foundations are one piece of property and, when they fail, they cause damage to ‘other’ property (walls, floors, etc.) a single indivisible unit of which the different parts are essentially independent...any defect in the structure is a defect in the quality as a whole.’³⁶⁸

³⁶⁵ *D & F Estates*, per Lord Bridge at 1007. Stephen Todd, ‘The law of negligence after *Murphy* in *Negligence after Murphy v Brentwood DC*.’ (1991).8; Stychin, above n 352, 399. In *Winnipeg Condominium Corp. n° 36 v Bird Construction Co.* [1995] 1 S.C.R. 85 La Forest J. rejected *D & F Estates* as having strong persuasive force in the Canadian context. He saw any duty in tort owed by the builder as independent from any contractual obligations: ‘The duty in tort extends only to reasonable standards of safe construction and the bounds of that duty are not defined by reference to the original contract. Certainly, for example, a contractor who enters into a contract with the original home owner for the use of high-grade materials or special ornamental features in the construction of the building will not be held liable to subsequent purchasers if the building does not meet these special contractual standards. However, such a contract cannot absolve the contractor from the duty in tort to subsequent owners to construct the building according to reasonable standards’. At 99.

³⁶⁶ Per Lord Bridge at 207.

³⁶⁷ O’Dair, above n 361, 568. The practicalities were not explained. How were the components parts supposed to be delineated? How far could it go? Was the plastering on the walls separate from the walls themselves? And the doorframe is separate from the door? Robyn Martin, above n 335, 91.

³⁶⁸ Per Lord Bridge, at 438.

However, His Lordship would be prepared to accept that a distinct item incorporated in a structure which because of its defect caused damage to the building structure might suffice. He gave the example of a defective central heating boiler exploding and causing damage to the building.³⁶⁹ Lord Keith gave a similar example of a defective electrical wiring that had been installed by one sub-contractor and caused a fire which destroyed the building.

Those examples,³⁷⁰ together with the one given by Lord Jauncey³⁷¹ made it unclear whether the complex structures approach has still any life left in it.³⁷²

Markesinis has also pointed out that in the examples given, the existence of an action appears to depend upon the factor that responsibility for the separate parts of the building rests with different persons. Thus, it is not clear whether it is also necessary to have regard to the degree of integration of the subcontractor's work into the whole, or the feasibility of physically separating the different components.³⁷³

2.3.2 The decision in *Murphy v Brentwood District Council*.³⁷⁴

In *Murphy*, the plaintiff bought a newly built house. The Local Authority approved plans for foundations on advice of independent consultant engineers. The design was defective, providing insufficient steel reinforcement of the foundations and a few years later serious cracks appeared in the walls. It did not appear that the structures posed an imminent risk of collapsing. In fact, the new buyer occupied the house with his family without bothering to make any repairs. The owner sold the house for £ 35,000 less than its market value instead of spending the £ 45,000 needed to repair the foundations. He claimed that the council was negligent and sought to recover that amount and other losses and expenses.

³⁶⁹ Per Lord Bridge at 927.

³⁷⁰ For the discussion of the weakness of those examples, see Grubb and Mullis, 'An unfair law for dangerous products: The fall of Anns'. [1991] Conv. 225, p. 229-233. It has also been submitted that the rejection of the complex structure argument in *Murphy* is based upon the idea that a building is erected by a single contractor, ignoring the reality of the complexity and amount of sub-contracting in the building industry. It would not be clear whether a negligent sub-contractor or an engineer or designer remote from the contract could incur in liability under the complex structure principle. Marianne Giles & Erika Szyszczak, 'Negligence and defective buildings: demolishing the foundation of Anns?' (1991) *Legal Studies*, 85, 92.

³⁷¹ Lord Jauncey gave the example of a subcontractor who negligently incorporates into a building a steel frame which which fails to give the required support to and thus damages the floors and walls.

³⁷² Markesinis & Deakin, above n 338, 621. On the contrary, Winfield & Jolowicz submit that the suggestion that *Murphy* 'disapproves' the complex structure theory is an oversimplification. Above n 246, 316. Also Todd, 'Policy issues in defective property cases' in Jason Neyer, Erika Chamberlain and Stephen Pitel (Eds.) *Emerging issues in Tort Law* (2007) 199, 202

³⁷³ Markesinis, above n 248, 107.

³⁷⁴ [1990] 2 All E.R. 908 (H.L.)

The House of Lords was mainly concerned with the liability of a local authority. It only addressed builder liability, on the assumption that the authority's liability could be no greater than that of the builder whose fault was the primary cause of the damage.³⁷⁵ There is no attempt in the judgments of Lords Keith, Bridge and Oliver to draw any distinction between the liability of the builder (for constructing a defective house) and that of the local council (for failing to check what the builder had done). In fact, Lord Oliver maintained that 'the liability of the local authority and that of the builder are not...logically separable'.³⁷⁶

Some commentators, however, have argued that the two issues, although obviously related, need not be decided identically.³⁷⁷ Markesinis suggests that the effect of restricting the tort liability of the builder of a defective structure is quite different (and allegedly, less justifiable) from restricting the liability of a public, regulatory authority.³⁷⁸

Feldthusen stresses the importance of analyzing economic loss in terms of discrete categories of claim, focusing upon the underlying policy issues raised by each category.³⁷⁹

The House of Lords unanimously held that a local authority (or a builder) owed no duty of care, that they should not be responsible in torts for defects that merely cause loss of value and, therefore, that *Anns* should be overruled together with *Dutton v Bognor Regis* and 'all decisions subsequent to *Anns* which purported to follow it'.³⁸⁰ In England, members of the public are no longer entitled to compensation if a local authority negligently fails to protect them against construction industry negligence. The law returned to a restrictive position towards allowing claims in tort for economic loss.

Feldthusen submits that the dominant theme which explains the decision in *Murphy* is judicial conservatism. He suggests that it is implicit in many of the speeches that the Law Lords believe that courts trying modern negligence cases ought not to venture beyond the necessary extensions of precedents decided 50 years ago and that all policy initiatives be effected by legislation rather than by the creation of new tort duties. He maintains that some *obiter dicta* in *Murphy* are reactionary to the point where they threaten to overturn or retard many modern developments in products liability and public authority law.³⁸¹

³⁷⁵Feldthusen, above n 2, 166; Winfield & Jolowics, above n 246, 316, Nicholas Rafferty, 'Winnipeg Condominium v Bird Construction. Recovery of pure economic loss in the tort of negligence: liability of builders to subsequent purchasers for construction defects'. (1995-1996) 34 *Alberta Law Review*, 472, 476.

³⁷⁶ [1991] 1 A.C. 398, 483.

³⁷⁷ Stychin, above n 353, 412.

³⁷⁸ Markesinis and Deakin, above n 338, 631.

³⁷⁹ Bruce Feldthusen, 'Economic loss in the Supreme Court of Canada: yesterday and tomorrow (1990-1991) 17 *Canadian Business Law Journal* 356, 370.

³⁸⁰ Per Lord Mackay L.C. at 912.

³⁸¹ Feldthusen, above n 379, 371.

In any event, Lord Keith's campaign against *Anns* joined by Lord Brandon, together with a generational change in the House of Lords presaged of the demise of *Anns*. All Law Lords who sat in *Anns* retired during the 1980's, including Lord Wilberforce himself (in 1982) so Lord Keith could reign sovereignly over the House as a senior member.³⁸²

Some explanations of *Murphy* (and its judicial hostility to *Anns*) stress the significance of the rise of Thatcherite values (self-help and *laissez-faire*). Others thought judges were suffering from America-phobia, believing that American citizens spent most hours of most days suing one another, to the exclusion of all productive activity and to the discredit of their legal system.³⁸³

Lord Bridge asserts that claims in respect of economic loss are only legitimate if the plaintiff can show reliance on the defendant within the *Hedley Byrne* principle.³⁸⁴ A convincing argument indicates that the purpose of a control factor such as reliance is to prevent the defendant being liable for an indeterminate amount to an indeterminate class for an indeterminate period. If there are other ways of averting this danger it seems pointless to require reliance by the plaintiff on the defendant. In *Murphy* there was no problem of indeterminacy. Firstly, there was no risk of liability to an indeterminate class because the defendant could only ever have been liable to the person owning the property when the cause of action arose and liability would have been limited to the value of the house.³⁸⁵ Secondly, there was no risk of liability in an indeterminate amount because the amount of liability will always be limited by the reasonable cost of repairing the dangerous defect in the building and restoring that building to a non-dangerous state.³⁸⁶ Moreover, the burden of proof will fall upon a plaintiff to demonstrate a serious risk to safety.³⁸⁷ Finally, there was little risk of liability for an indeterminate time because the contractor will only be liable for the cost of repair of dangerous defects during the useful life of the building³⁸⁸ and, over time, it will be increasingly difficult for a plaintiff to establish that deterioration is caused by the negligence of the defendant builder.³⁸⁹

The main issue in *Murphy* appeared to be trying to determine what sort of damage the owner had suffered. The question whether defective premises constitute a physical damage or

³⁸² Howarth, above n 128, 59.

³⁸³ *Idem*, 66.

³⁸⁴ At 930.

³⁸⁵ O'Dair, above n 361, 563.

³⁸⁶ Laura C.H. Hoyano, 'Dangerous defects revisited by bold spirits' (1995) 58 *Modern Law Review*, 887, 891.

³⁸⁷ Stychin, above n 353, 390.

³⁸⁸ Rafferty, above n 375, 479.

³⁸⁹ Stychin, above n 353, 391.

a pure economic loss received in *Murphy* a definite answer: any defect, dangerous or otherwise, amounted to a pure economic loss and could not be classified as physical damage.

Lord Bridge, for instance, said that:

‘If a builder erects a structure containing a latent defect which renders it dangerous to persons or property, he will be liable in tort for injury to persons or damage to property resulting from that dangerous defect. But, if the defect becomes apparent before any injury or damage has been caused, the loss sustained by the building owner is purely economic. If the defect can be repaired at economic cost, that is the measure of the loss. If the building cannot be repaired, it may have to be abandoned as unfit for occupation and therefore valueless. These economic losses are recoverable if they flow from breach of relevant contractual duty, but...in the absence of a special relationship of proximity they are not recoverable in tort.’

The House of Lords found the artificial determination of the defect/damage distinction in *Anns* unacceptable. A defect remained a defect no matter how dangerous, and could not be reclassified as damage.³⁹⁰

All defects, whatever degree of seriousness, represented a pure economic loss and, as such, not recoverable.³⁹¹ Their Lordships rejected the ‘danger to health’ theory as illogical and lacking in all principle and affirmed that no sensible distinction could be drawn between a mere defect of quality and a supposedly dangerous defect.

For Lord Bridge³⁹², analyzing the loss as purely economic was important because the recovery of such losses was, in the absence of reliance in the *Hedley Byrne* sense or of a rare *Junior Books* type relationship, the function of contract law. No reason is given for this assertion.³⁹³

Lord Oliver said that the categorization of the damage in *Anns* had served to obscure not only the true nature of the claim but, as a result, the nature and scope of the duty upon the breach of which the plaintiffs in that case were compelled to rely.³⁹⁴

Lord Keith adopted a passage of Deane J. of the High Court of Australia in *Suthershire Council v Heyman*:³⁹⁵

‘The only property, which could be said to have been damaged in such a case, is the building, itself. The building itself could not be said to have been subjected to ‘material, physical damage’ by reason merely of the inadequacy of its foundations since the building never existed otherwise than with its foundations in that state. Moreover, even if the inadequacy of its foundations could be seen as physical,

³⁹⁰ Robyn Martin, ‘Tortious liability for defective premises in English law after *Murphy v Brentwood*: learning from the Commonwealth’ (1997) 2 *Newcastle Law Review*, 82, 86.

³⁹¹ In fact, the *imminent danger* requirement lies in the fact that the local authority’s duty of care (with which the cases were primarily concerned) originated in its functions under the public health legislation. Winfield & Jolowics, above n 246, 316.

³⁹² At 475, 480 and per Lord Jauncey at 498.

³⁹³ O’Dair, above n 361, 563.

³⁹⁴ At 443-4, 448.

³⁹⁵ (1985) 60 A.L.R. 1, 601.

material damage to the building, it would be damage to property in which a future purchaser or tenant had no interest at all at the time when it occurred’.

Howarth submits that the new orthodoxy is empty of content. We are told, he says, that *Anns* is wrong, the local authorities and builders should not be liable for negligently reducing the value of a house, and, moreover, the two stage test for the existence of a duty of care is inadequate. But all we are offered in substitution is a three-stage test that inserts between Lord Wilberforce’s two stages a third stage called ‘proximity’, something that even the judges admit is too vague to define. Since nobody knows what ‘proximity’ means, he concludes, it can be asserted in every case to require whatever result is convenient.³⁹⁶

Feldthusen also regrets the absence in *Murphy* of any compelling justification for the dramatic change in English law. The criticism of *Anns*, he says, was rooted in judicial conservatism: the imminent risk rule in *Anns* was novel and novel rules of that sort are the province of Parliament.³⁹⁷

In *Anns*³⁹⁸ Lord Wilberforce had said that the amount of expenditure necessary to restore a dwelling to a condition in which it is no longer a danger to health or safety was recoverable. This notion of damages as ‘preventive’ compensation did not survive in *Murphy* either. The House regarded as illogical the distinction between breach of a duty to prevent physical harm and breach of a duty to prevent economic loss, because the loss was economic in either event. The possibility that liability for economic loss incurred in repairing dangerous defects might encourage safety was either ignored or dismissed peremptorily.³⁹⁹ Lord Bridge stated that,

If a **dangerous defect** in a chattel is discovered before it causes any personal injury or damage to property, because the danger is now known and the chattel cannot be safely used unless the defect is repaired, the defect becomes merely a defect in quality. The chattel is either capable of repair at economic cost or it is worthless and must be scrapped. In either case the loss sustained by the owner or hirer of the chattel is purely economic. It is recoverable against any party who owes the loser a relevant contractual duty. But it is not recoverable in tort in the absence of a special relationship of proximity imposing on the tortfeasor a duty of care to safeguard the plaintiff from economic loss. There is no such special relationship between the manufacturer of a chattel and a remote owner or hirer.⁴⁰⁰

He thought that those principles were equally applicable to buildings.

O’Dair submits that it is important to question one of the central assumptions of *Murphy*, namely that the same principles must apply to chattels and premises. He maintains that even if it is true that on discovering the defect the owner of a defective chattel can avert

³⁹⁶ Howarth, above n 128, 60.

³⁹⁷ Feldthusen, above n 2, 166.

³⁹⁸ [1978] AC 728 (HL).

³⁹⁹ Feldthusen, above n 379, 368.

⁴⁰⁰ [1990] 2 All ER 908 at 925.

all danger by discarding it, this is not usually true of the owner of defective premises. He concludes that Mr. Murphy was able to move because he was insured, otherwise, he says, he would presumably have had to remain in a house which was subject to leaking sewage and the threat of a fractured gas main due to its defective foundations.⁴⁰¹

Lord Bridge, however, was prepared to consider one case of possible preventive damages being awarded:

If a building stands so close to the boundary of the building owner's land that after discovery of the dangerous defect it remains a potential source of injury to persons or property on neighbouring land or on the highway, the building owner ought, in principle, to be entitled to recover in tort from the negligent builder the cost of obviating the danger.⁴⁰²

No reason was given for this exception. Markesinis asks why should expenditure incurred to avoid legal liability to a third⁴⁰³ party on the highway or on the neighbouring land be recoverable when similar expenditure designed to avert physical injury to the occupiers of the property is not?⁴⁰⁴ Similar doubts are raised by O'Dair, who asks why, if the owner is entitled to spend money so as to avert the danger of liability to his neighbours, is he not entitled to spend money so as to avoid liability to his visitors.⁴⁰⁵ No doubt, the logic of a rule permitting recovery of repairs costs for dangerous defects to avert liability to persons on neighbouring land, but precluding recovery where the expenditure removes the owner's potential liability as an occupier to persons actually on the defective premises arising from the self-same hazard is, at best, obscure.⁴⁰⁶

Winfield suggests that it could perhaps be justified on the basis that the building would constitute a nuisance in respect of which the adjoining landowner would be able to obtain an injunction requiring repair or demolition. Alternatively, he says, it may represent a rather broader principle whereby the plaintiff may recover the cost of removing a danger which threaten others and for which the defendant is responsible.⁴⁰⁷

⁴⁰¹ O'Dair, above n 361, 563. Lord Keith's argument in *Winnipeg* that there is no distinction in principle between a useless article and a dangerous article which has not yet inflicted injury, since in either case the owner can simply repair or discard that article and so remove the danger, was described as being unrealistic in practice, since home owners simply do not have that choice. (1995) 121 D.L.R. (4th) 193 at 214.

⁴⁰² [1991] A.C. at 475.

⁴⁰³ Markesinis, above n 248, 319.

⁴⁰⁴ *Idem*, 107.

⁴⁰⁵ O'Dair, above n 361, 568.

⁴⁰⁶ Robin Cooke, 'An impossible distinction' in *Negligence after Murphy v Brentwood DC*, (1991) 58; Fleming (1990) 106 *Law Quarterly Review*, 527. Wallace also agrees that the facts postulated by Lord Bridge would constitute a nuisance. Nothing but a particular involuntary *constraint* requiring expenditure by an owner once a defect has become patent and, in all respects comparable to strong commercial, legal, insurance or social constraints to repair the dangerous crane which were the basis of the dissenting *Rivtow* judgments. I.N. Duncan Wallace, 'Anns beyond repairs', (1991) 107 *Law Quarterly Review* 228, 238.

⁴⁰⁷ Winfield & Jolowicz, above n 246, 318.

Markesinis suggests that *Murphy* also cast doubt on the ‘complex structure’ theory.⁴⁰⁸ However⁴⁰⁹, the situation seems to be that, although the theory was doubted by Lord Bridge⁴¹⁰ and condemned by Lord Oliver⁴¹¹ it nevertheless seem to have survived if one is to judge by the series of ‘complex structures’ examples which Lord Bridge⁴¹², Keith⁴¹³ and Jauncey⁴¹⁴ were willing to accept as capable of giving rise to liability in the event of ‘spreading loss’.⁴¹⁵

2.3.3 *Murphy* in other Commonwealth jurisdictions.

By the end of the 80’s the law concerning defects in products or structures which manifest themselves before accident-caused damage occurs to persons or property was described as an ‘authoritative chaos’.⁴¹⁶

In 1990, Feldthusen maintained there was authority in the House of Lords for three entirely different rules, and equal uncertainty in the courts below. a) *Anns v Merton*⁴¹⁷ held that the plaintiff could recover in negligence if the product posed an imminent risk of accident-caused damage to other persons or property; b) *Junior Books v Veitchi*⁴¹⁸ might have been taken to stand for the proposition that one could recover the cost of remedying even non-dangerous defects from a non-privity party. There followed a rash of decision distinguishing, reinterpreting and disapproving *Junior Books*; c) *D & F Estates* seemed to endorse the rule that the action in negligence was restricted to cases in which the defect actually caused damage to other persons or property, but purporting to follow that decision, the Court of

⁴⁰⁸ Basil Markesinis and Simon Deakin, *Tort Law* (2008) 182. Feldthusen submits that the ‘semantic juggling’ of the complex structure theory has been soundly rejected in *Murphy*. Above n 2, 164.

⁴⁰⁹ Contrary to this view, Todd suggests that the ‘complex structure’ theory was accepted in principle, but held not to apply on the facts. Stephen Todd, ‘Policy issues in defective property cases’ in Jason Neyer, Erika Chamberlain and Stephen Pitel (Eds.) *Emerging issues in Tort Law* (2007) 199, 202. Winfield & Jolowics also submit that the suggestion that *Murphy* ‘disapproves’ the complex structure theory is something of an oversimplification. In fact, whilst it was made clear that the theory could have no application to cases involving defective foundations, only Lord Oliver could bring himself to reject it altogether. Lords Bridge, Keith and Jauncey each gave examples of exceptional instances where the theory might be applicable.

⁴¹⁰ [1991] 1 A.C. 398, 476.

⁴¹¹ At 476.

⁴¹² At 478.

⁴¹³ At 470.

⁴¹⁴ At 497.

⁴¹⁵ Markesinis and Deakin, above n 338, 636.

⁴¹⁶ *Simaan General Contracting Co v. Pilkington Glass Ltd. (nº2)* [1988] 1 All E.R. 791 (C.A.) per Donaldson M.R at. 806.

⁴¹⁷ [1978] AC 728.

⁴¹⁸ [1982] 3 All ER 201 (HL).

Appeal in *Department of the Environment v Thomas Bates & Son Ltd.*⁴¹⁹ seemed to endorse the imminent risk rule again.⁴²⁰

While in England some author believes *Murphy v Brentwood*⁴²¹ certainly clarified the law⁴²² in other Commonwealth jurisdictions it has been considered a deeply disappointing decision and has not been followed.

(a) Canada

The rejection began in Canada with *Winnipeg Condominium Corp v Bird Construction*.⁴²³ The facts were fairly simple. The defendant was a general contractor responsible for the construction of a 15-storey building. Bird subcontracted the masonry work. The building was completed in 1974 and the plaintiff became the owner in 1978. In 1982 cracks began to appear in the stone cladding on the building. In 1989, a storey-high section of the cladding, approximately 20 feet in length, fell from the ninth storey. No injury or property damage resulted. Following the advice of engineers consultants, Winnipeg Condo replaced the entire cladding at the cost of 1.5 million dollars. The plaintiff sued the contractors, the architects and the subcontractor who had installed the cladding. Bird and the subcontractor responded with a motion to strike out the claim as disclosing no cause of action.

At the trial court, Galanchuk J. dismissed the motion and Bird appealed successfully at the Court of Appeal where it was held that recovery was precluded by the principle of *caveat emptor* and by compelling policy concerns, as set out by the House of Lords in *D & F Estates Ltd. v Church Commissioners for England*.⁴²⁴

On further appeal, the Supreme Court of Canada faced a choice between two sharply contending lines of authority: a) the ‘dissenting Rivotow principle’ which would allow the recovery of anticipatory repairs at least where they were undertaken to eliminate a source of

⁴¹⁹ [1989] 1 All E.R. 1075 (C.A.) Later revised in the House of Lords [1991] 1 AC 499.

⁴²⁰ Feldthusen, above n 379, 367.

⁴²¹ [1990] 2 All ER 908 (HL).

⁴²² Winfield & Jolowics, above n 246, 319. In Canada, Feldthusen also believes that, after the House of Lords’ decision in *Murphy*, the law in England is now clear: absolutely no product defect economic loss claims, even claims for calamitous damage, would be allowed in negligence. Above n 2, 165.

⁴²³ (1995) 121 D.L.R. (4th) 193.

⁴²⁴ [1989] AC 177 (HL).

danger and b) the opposing line of authority that found its source in *D & F Estates* and which would deny recovery for anticipatory repairs.⁴²⁵

In *Rivtow Marine Ltd v Washington Iron Works*⁴²⁶ a majority had found that the cost of repair of a defective crane was not itself recoverable, although other losses were subject to claim in negligence based on the defendant's failure to warn the plaintiff that the crane was dangerous. However, in a vigorous dissent which subsequently attracted considerable attention from the judiciary throughout the Commonwealth, Laskin J. would have allowed the plaintiff to recover the cost of repairing the dangerously defective crane. He said that since a manufacturer was unquestionably liable for physical damage caused by its defective products, it should equally be liable for the economic losses incurred in rendering its products safe. In his own words:

'If physical harm had resulted, whether personal injury or damage to property (other than to the crane itself), Washington's liability to the person affected, under its anterior duty as a designer and manufacturer of a negligently-produced crane, would not be open to question. Should it then be any less liable for the direct economic loss to the appellant resulting from the faulty crane merely because the likelihood of physical harm, either by way of personal injury to a third person or property damage to the appellant, was averted by the withdrawal of the crane from service so that it could be repaired?'⁴²⁷

The basic rationale behind the majority approach that product defect economic loss may only be recovered in contract unless the defect manifests itself in an accident is that product quality claims cannot be considered divorced from the terms of the contract. In effect, in the majority's opinion, to recognize in that case a tortious claim would be to create a contractual warranty flowing from the manufacturer to the ultimate consumer. Since the claim was contractual in origin, it could not be enforced against the manufacturer by a stranger to the manufacturer's contractual relationships.⁴²⁸

Ritchie J. maintained that:

'The liability for the cost of repairing damage to the defective article itself and for the economic loss flowing directly from the negligence, is akin to liability under the terms of an express or implied warranty of fitness and as it is contractual in origin cannot be enforced against the manufacturer by a stranger to the contract.'⁴²⁹

The basic rationale behind Laskin's dissent was deterrence, a point ignored or trivialized by the House of Lords in *Murphy*.⁴³⁰

⁴²⁵ Mayo Moran, 'Rethinking *Winnipeg Condominium*: Restitution, economic loss, and anticipatory repairs' (1997) 47 *University of Toronto Law journal*, 115, 117.

⁴²⁶ (1993) 40 D.L.R. (3d) 530.

⁴²⁷ At 548-9.

⁴²⁸ Rafferty, above n 375, 474.

⁴²⁹ At 541.

⁴³⁰ Feldthusen, above n 379, 370.

The high water mark for this *Rivtow* principle finally came in *Winnipeg Condo*, clearly underpinning La Forest J.'s decision whilst adopting the reasoning of Laskin J. The issue to be resolved was framed succinctly by La Forest J. at the start of his judgment for the Supreme Court:

'May a general contractor responsible for the construction of a building be held tortiously liable for negligence to a subsequent purchaser of the building, who is not in contractual privity with the contractor, for the cost of repairing defects in the building arising out of negligence in its construction?'⁴³¹

And in a central passage of his judgment, he said:

'If a contractor can be held liable in tort where he or she constructs a building negligently and, as a result of that negligence, the building causes damage to persons or property, it follows that the contractor should be held liable in cases where the dangerous defect is discovered and the owner of the building wishes to mitigate the danger by fixing the defect and putting the building back into a non-dangerous state. In both cases, the duty in tort serves to protect the bodily integrity and property interests of the inhabitants of the building'.⁴³²

Moreover, as a matter of policy, he says, the law should provide incentives for the plaintiff to mitigate the danger of the defect in order to further both the goals of accident prevention and economic efficiency. The builder should not be 'insulated' from liability because of the current owner's mitigation of the danger which it, the builder, negligently created in the first place.

Rafferty considers La Forest's reasoning in favour of granting relief in respect of dangerous defects is persuasive. However, he recognizes there will be difficulties in future cases in determining just when a building constitutes a 'real and substantial danger' to its inhabitants and in distinguishing between buildings that are dangerous as opposed to merely substandard. He concludes that, in practice, this latter distinction may prove impossible to draw.⁴³³

Todd agrees that the distinction between dangerous and shoddy may not be easy to draw. He points out that, although the danger in *Winnipeg* was clear enough, the answer to that question may frequently be quite uncertain. Inquiries into that matter are likely to be artificial and unrewarding, neither seeming sensible that a remedy might be excluded in cases where the element of danger is unclear.⁴³⁴

⁴³¹ [1995] 3 W.W.R. 85 (S.C.C.) at 88-89.

⁴³² At 106-107.

⁴³³ Rafferty, above n 375, 479.

⁴³⁴ Stephen Todd, 'Defective property: the turn of the Privy Council', (1996) 4 *Tort Law Review*, 91, 94.

(b) Australia.

In Australia, the High Court in *Bryan v Maloney*⁴³⁵ also declined to follow *Murphy* returning to ‘a nostalgic era of pragmatic, policy based decision making’.⁴³⁶

Bryan v Maloney was a typical foundations case with progressive cracking appearing in the walls of a dwelling house.⁴³⁷ Mrs. Maloney bought a house. The purchase turned out to be disastrous when foundations were later found to be defective causing extensive damage. The defendant, Bryan, was an inexperienced professional builder who had built the house under a contract with its first owner, his sister-in-law some years before. The plaintiff inspected the house three times before purchasing it and, noticing no cracks or other defects, believed the house to be solid and properly built. Six months after the purchase, cracks began to appear in the walls of the house. Mrs. Maloney sued the builder. It was agreed, among other things, that Mr. Bryan was negligent in building the house with inadequate footings and that the damage (economic loss) was a foreseeable consequence of Mr. Bryan’s negligence. The issue before the High Court was solely whether Mr. Bryan owed Mrs. Maloney, as a subsequent purchaser of the house, a duty of care under the law of negligence. Unlike *Winnipeg*, the defects were expressly stated not to be dangerous, but merely quality defects reducing the value of the property.

The majority in the High Court held that the relationship between a builder and a subsequent purchaser of residential property was sufficient to attract a duty on the part of the builder to take care to avoid reasonably foreseeable economic loss.

Brennan C.J. in his dissent would have found the builder liable had the defects been dangerous as in *Winnipeg*, which he expressly approved. In his view, the imposition of warranties of that kind on one person in favour of another, when there is no contractual relationship between them, is contrary to any sound policy requirement. It has been submitted that, arguably, this is so for two reasons. First, the open market and contracts can better reflect quality through the price at which goods or buildings are bought and sold. Second, the appropriate forum for determining whether houses should be more expensive (by the inclusion of mandatory warranties) is parliament, not the court.⁴³⁸

⁴³⁵ (1995) 182 C.L.R. 609.

⁴³⁶ Martin, above n 335, 116.

⁴³⁷ Ian Duncan Wallace, ‘*Murphy* rejected: The *Bryan v Maloney* landmark’ (1995) 3 *Tort Law Review*, 231, 234.

⁴³⁸ Brennan J was the judge who led the majority of the High Court of Australia in *Council of the Shire of Sutherland v Heyman* when they departed from the *Anns* principle. Philip Clifford and Craig Sharp, ‘Negligence, duty, economic loss and policy.’ (1995) 3 *Tort Law Review*, 173, 176.

On its facts, *Bryan v Maloney* widened the scope of damage for pure economic loss to embrace defects which are both structural and latent. Conceptual support for the decision was found in the concept of proximity, (general) reliance and assumption of responsibility.⁴³⁹

After *Bryan*, there were concerns whether the same principle should apply to commercial buildings or to buildings with mixed commercial and residential purposes.⁴⁴⁰ Its application to commercial premises had been considered on numerous occasions by several intermediate courts and the decisions indicated a restrictive approach to the question of a builder's liability to subsequent purchasers for latent defects in construction. These courts have generally preferred to construe the High Court's decision strictly as a determination more reflective of its particular facts (in relation to residential dwellings), rather than as one applicable to a broad category of cases.

Finally, in *Woolcock v CDG*⁴⁴¹, the question was in issue before a differently constituted High Court. An engineer designed a warehouse for a developer who later sold it to a new owner. Soon, it became apparent that the building was suffering substantial structural distress and the owner decided to sue the engineer. The matter was treated as requiring an answer to a substantial question of law; namely, whether the respondents owed the appellant a duty of care.

A consideration of whether the distinction between purchasers of commercial and residential premises should be maintained in determining a builder's duty of care for pure economic loss required the High Court in *Woolcock* to ascertain whether there was good reason, in terms of principle or policy, to confine the decision in *Bryan*. It was noted that in *Bryan v Maloney*, significant attention was given to the notion of proximity, and since the doctrine of proximity had been rejected by the High Court in 2001, the significance of *Bryan v Maloney* had been diminished.

The majority of the High Court, focusing on the question of vulnerability, confirmed that no duty of care was owed, and that neither the principles applied in *Bryan v Maloney*, nor those principles as developed in subsequent cases supported *Woolcock's* claim. Whilst Kirby J provided a lone dissent, Gleeson CJ, Gummow, Hayne and Heydon JJ, in finding for the respondents, provided a joint judgment holding that the facts alleged did not show that the

⁴³⁹ Francis Trindade, Peter Cane and Mark Lunney, *The law of torts in Australia* (4th ed. 2007) 501.

⁴⁴⁰ Stephen Todd, 'Policy issues in defective property cases' in Jason Neyer, Erika Chamberlain and Stephen Pitel (Eds.) *Emerging issues in Tort Law* (2007) 199, 204. In fact, one of the decisions cited in the majority judgment: *National Mutual Life Association of Australasia Ltd. v Coffey & Partners Pty. Ltd.* [1991] 2 Qd R 401, concerned an industrial building in relation to which the Full Court of Queensland had refused to strike out the statement of claim

⁴⁴¹ (2004) 216 C.L.R. 515.

owner could not have protected itself from the economic consequences of the defendant's negligence, by obtaining a warranty from the vendor against defects in the building or by an assignment of any rights of the vendor against third parties.

Although the defect in *Woolcock* was non-dangerous, the distinction between dangerous and non-dangerous defects played no role in the reasoning supporting the decision.

Whilst *Bryan v Maloney* has not been entirely overruled, it seems that the High Court is yet to clarify the liability of builders to subsequent owners under the ordinary laws of negligence. If anything, the issue has been further complicated by recent decisions and the shift from reliance on proximity to vulnerability has arguably added little to the question of when a duty of care will be owed. The High Court declined to extend the principle in *Maloney* to chattels, and so the law in Australia remains unsettled in this respect.

According to Wallace, *Bryan* seems destined for an uneasy future, requiring at least clarification, or perhaps even revision, of its rationale if unacceptable anomalies or difficulties of application in many real life situations are to be avoided.⁴⁴²

At any event, the decision in *Bryan v Maloney* has now been superseded in most states and territories by statutory schemes for protection of successive owners of dwellings.⁴⁴³

Some presumably anomalies that could result when tort trespasses in the realm of tort have been noted in *Zumpano v Montagnese*.⁴⁴⁴ What would the position be if the builder did not undertake the responsibility of constructing footings which would be adequate during the ordinary lifetime of the house, or if he had warned the proprietor of the inadequacy of the proposed footings and nevertheless been instructed to proceed, or if there was a disclaimer or limitation clause?⁴⁴⁵

The facts of the case were relatively straight-forward. The Zumpanos were professional builders. In 1985, they built a family home for their own occupation, but after a little over a year, they sold the house to the Montagneses. In 1991, they discovered through a plumber who had been engaged by them to attend the property that a boundary trap had not been installed by the builders' original plumber when the house was constructed. The owners sued the builders in negligence for the cost of installing the boundary trap and reinstating the landscaping. The evidence in respect of the boundary trap was that the builders had left it to

⁴⁴² Ian Duncan Wallace, 'The *Murphy* saga in Australia: *Bryan* in difficulties? (1997) 113 *Law Quarterly Review*, 355, 357.

⁴⁴³ Todd, above n 440, 205.

⁴⁴⁴ (1997) Aust Torts Reports 81-406.

⁴⁴⁵ Robert Brooking, '*Bryan v Maloney*- its scope and future' in Nicholas Mullany and Allen Linden (Eds.) *Torts Tomorrow. A tribute to John Fleming* (1998)

their sub-contracting licensed plumber to perform the necessary works, namely to supply all waste and vent pipes and make the sewerage connection.

The trial judge affirmed the liability of the vendors in negligence. However, in the Court of Appeal Tadgell and Phillips JJA. held that there was no negligence by the builders and they were not to be held liable for the default of their sub-contractor as there was no evidence that the builders should have checked that the boundary trap was installed by the plumber. i.e. it was reasonable to rely on the plumber and the inspector of the authority who inspected the plumber's work. Their Honours rejected the argument that the builders had a non-delegable duty as that duty usually related to cases involving safety issues. Their Honours also indicated that the builders could *not* be liable under the *Bryan v Maloney* principle for the negligence of their independent contractor.

Brooking J.A. said that the material difference in facts between *Zumpano* and *Bryan* was that “the expressed rationale of the *Bryan* majority had depended on the original builder having contracted with (and so having relied on by) the first owner...”, whereas in the *Zumpano* case, the plaintiff builders were professional builders building the house for their own occupation. It may therefore be inferred from the decisions that, where a builder erects a house “otherwise than under a contract” he cannot be expected to assume overall responsibility for the actions of the independent contractor.

He also identified a large number of questions that were not answered in *Bryan v Maloney*, such as the kinds of buildings covered by it, the type of defects and the significance of the terms of the contract between the builder and the first owner, suggesting that it was a decision that should be reconsidered in the future.

Bernstein submits that, whilst Brooking J.A. is correct in stating that the High Court’s decision in *Bryan v Maloney* does not provide the answers to the questions that he has identified, this is not a valid reason for suggesting that the decision ought to be reconsidered by the high Court. He believes that *Bryan* was intended to be restricted to those cases in which the defect created by the builder, architect, engineer or local authority was latent and would not reasonably have been discovered on an intermediate inspection. Thus, he argues that the other variations on a theme identified by Brooking JA in *Zumpano* will be able to be resolved quite easily by judges in due course when appropriate fact-situations present themselves for decision.⁴⁴⁶

⁴⁴⁶ Bernstein, above n 23, 405.

Duncan Wallace considers all three judgments in *Zumpano* of the greatest value in all jurisdictions on the independent contractor point and it represents, in his view, the best and most thoroughly researched discussion in any common law jurisdiction, of this very important concept in the context of claims in negligence for defective buildings.⁴⁴⁷

(c) New Zealand

The New Zealand Court of Appeal faced in *Invercargill CC v Hamlin*⁴⁴⁸ almost the same issue as had confronted the House of Lords in *Murphy*, i.e. classic failure of inadequate foundations, resulting in movement and cracking, some of it progressive and at intervals, and jamming of doors, with a significantly later date after the earlier damage when a prudent purchaser would ultimately have realised that something worse than normal settlement and weather changes were responsible.⁴⁴⁹

The plaintiff had bought a piece of land in the south of New Zealand. The seller was a builder who also contracted with him to build a house. The foundations, that had been inspected and approved by the council building inspector, were defective and major cracks appeared some years later. As the builder was no longer in business, the action proceeded against the local authority for the recovery of the economic loss which consisted in the diminution in value of the house.

The facts gave rise to two important issues: (1) could a local authority be liable for latent defects contributed to, or caused by, the careless acts or omissions of building inspectors in carrying out inspection of houses under construction?; and (2) when did such liability arise, when the damage occurred or when it was reasonably discoverable?⁴⁵⁰

The Court of Appeal, in a remarkable display of forceful unanimity, refusing to follow the decision of the House of Lords in *Murphy*, held that the council was liable in negligence to the plaintiff. In arriving at this decision, the court laid great stress on the policy issues which affect house building in New Zealand and which, they said, pointed to reliance by house owners on councils to ensure compliance with building codes and full recognition of that reliance by local authorities.⁴⁵¹ The reliance in question was a general reliance, rather

⁴⁴⁷ Wallace, above n 442, 359.

⁴⁴⁸ [1994] 3 N.Z.L.R. 513.

⁴⁴⁹ I.N. Duncan Wallace, 'No somersault after *Murphy*' (1995) 111, *Law Quarterly Review*, 285, 290.

⁴⁵⁰ Rosemary Tobin, 'The last word on building negligence? *Invercargill City Council v Hamlin*' (1996) 4 *Tort Law Journal*, 13.

⁴⁵¹ Michael F. James, 'Tortious liability for defective buildings-a Commonwealth perspective' (1995) 11 *Professional Negligence*, 132.

than a specific reliance along the lines of *Hedley Byrne* established on the facts of a particular case; the average prudent purchaser would expect that the by-laws and regulations of the council would have been complied with.⁴⁵²

Cooke P. commented on the divergence between the Commonwealth jurisdictions:⁴⁵³

‘While the disharmony may be regrettable, it is inevitable now that the Commonwealth jurisdictions have gone on their own paths without taking English decisions as the invariable starting point...Whatever may be the position in the United Kingdom, homeowners in New Zealand do traditionally rely on local authorities to exercise reasonable care not to allow unstable houses to be built in breach of bylaws. The linked concepts of reliance and control have underlain New Zealand case law in this field from *Bowen*⁴⁵⁴ onwards.’⁴⁵⁵

Richardson J. identified several factors that distinguished the position in New Zealand from the one that existed in England: the high proportion of occupier-owned housing in New Zealand; the fact that much housing construction was undertaken by small scale cottage builders for individual purchasers; the existence of significant governmental support for private home building and home ownership; the existence of governmental regulation of the building industry through building bylaws and the fact that it is not common for house buyers to commission engineering or architectural examinations or surveys.

Another fact of significant relevance was that the New Zealand Parliament had enacted the Building Act in 1991 which dealt specifically with building regulations and controls. If the Parliament had chosen not to bring the law into line with *Murphy* then, it did not look appropriate that a judicial decision should do it.

It has been pointed out that many of those features, distinctive of the New Zealand housing market, could equally be attributed to the English situation at the time. But, whether in fact New Zealand housing conditions differed sufficiently from the English situation so as to justify differing law was not the issue. What mattered was held to be not the conditions themselves, but the ‘perception’ of those conditions in New Zealand.⁴⁵⁶

In relation to the limitation period, the Court of Appeal held, by a majority of four to one, that a cause of action arose when the defects were discovered or could have been

⁴⁵² Tobin, above n 450, 18.

⁴⁵³ With undisguisable excitement, Cheer said that the judgment appears to be a hymn in favour of the right of the Commonwealth jurisdictions to go their own ways without taking English decisions as the invariable starting point. Ursula Cheer, New Zealand Court of Appeal rejects the *Murphy* approach to tort liability for defective buildings’ (1995) 3 *Tort Law Review*, 90.

⁴⁵⁴ In *Bowen v Paramount Builders (Hamilton) Ltd.* [1977] 1 N.Z.L.R. 394 the Court of Appeal established that there is a duty to exercise reasonable care actionable in tort on builders and local authorities. Cooke himself had heard *Bowen* seventeen years earlier. Martin, above n 334, 119.

⁴⁵⁵ At 519.

⁴⁵⁶ Per Lord Lloyd at 379.

discovered by reasonable diligence. Thus, the decision of the House of Lords in *Pirelli v Oscar Faber*.⁴⁵⁷

The defendant appealed to the Privy Council, arguing that the line of New Zealand authority relied upon by the Court of Appeal had been based on the English cases of *Dutton* and *Anns*. As those cases had been found by the House of Lords to be wrongly decided, then New Zealand authority was intrinsically flawed.

The dilemma was set: were the Privy Council to agree with the New Zealand Court of Appeal, their decision could be interpreted as undermining the House of Lords in *Murphy*. To overturn the decision of the lower court would be to impose on New Zealand, and on other jurisdictions subject to the Privy Council, principles of law which have been clearly and consciously rejected by New Zealand and other commonwealth courts.⁴⁵⁸

Toby remarks that it was fortuitous that between the time of the Court of Appeal's decision and the time of the hearing in London of the Privy Council appeal both the Supreme Court of Canada in *Winnipeg* and the High Court of Australia in *Bryan v Maloney* had occasion to consider building negligence cases declining to follow *Murphy*.⁴⁵⁹

In a *luminous judgment*⁴⁶⁰ Lord Lloyd, delivering the decision of the Privy Council, confirmed that the Court of Appeal judgment was entirely in accordance with the law as it had developed in New Zealand over the last 20 years. He stated that:

'The ability of the common law to adapt itself to the differing circumstances of the countries in which it has taken root is not a weakness, but one of its great strengths. Were it not so, the common law would not have flourished as it has, with all the common law countries learning from each other.'⁴⁶¹

And then he continued saying that it was the function of the board to ensure that when the New Zealand Court of Appeal purported to apply settled principles of English common law, it applied those principles correctly.

'But in the present case the judges in the New Zealand Court of Appeal were consciously departing from English case law on the ground that conditions in New Zealand are different. Were they entitled to do so? The answer must surely be 'yes'.⁴⁶²

One special reason why this particular branch of the law was unsuited to the imposition of a single monolithic solution was the fact that there was already divergence in other common law jurisdictions such as Canada and Australia. Tobin points out that the board

⁴⁵⁷ [1983] A.C. 1.

⁴⁵⁸ Robyn Martin, 'Diverging Common Law- *Invercargill* goes to the Privy Council.' (1997) 60 *Modern Law Review*, 94, 95.

⁴⁵⁹ Tobin, above n 450, 13, 17.

⁴⁶⁰ Duncan Wallace, 'No surprises in the Privy Council' (1996) 112 *Law Quarterly Review* 369, 370.

⁴⁶¹ At 376.

⁴⁶² *Idem*.

cited the decision of *Winnipeg* and *Bryan v Maloney*, not to cast doubt on *Murphy*, but to show that more than one view was possible.⁴⁶³

In relation to the limitation period, the Privy Council accepted the injustice of the application of the *Pirelli* test. The board, citing an article by Stephen Todd, confirmed that once it was appreciated the loss incurred was economic then many difficulties surrounding the limitation issue went away. The element of loss necessary to support a claim for economic loss did not exist so long as the market value of the house was not affected. It was only when the market value of the house suffered that all the elements necessary to support the plaintiff's claim came into existence.⁴⁶⁴

With *Invercargill* the issue for New Zealand is settled by its highest court: both public and private defendants are liable in tort where they assist in the creation of a latent defect in a building.

For some authors, in these decisions, the courts of New Zealand, Canada and Australia have taken a consumer-protectionist, plaintiff-oriented approach to this area of law and they have highlighted the policy argument in favour of the *Anns* principle.⁴⁶⁵ In any event, *Winnipeg*, *Invercargill* and *Bryan v Maloney* all cast serious doubt on the viability of *Murphy*⁴⁶⁶ and each of these courts could be said, as Laura Hoyano suggested, to be *bold spirits*.⁴⁶⁷

In the recent decision of *Rolls-Royce New Zealand Ltd v Carter Holt Harvey Limited*⁴⁶⁸ the relationship between tort and contract came before the Court of Appeal together with the issue whether a duty ought to be recognised in the case of commercial properties. In that case Genesis made a contract with Carter Holt Harvey to build an industrial plant. Genesis subcontracted some of the work to Rolls Royce. There was no direct contractual relationship between Carter Holt and Rolls Royce. Both contracts contained limitation of liability clauses. A clause in the contract between Genesis and Carter Holt enabled the latter to require Genesis to take proceedings against Rolls Royce to enforce the contractual obligations existing in the subcontract for Carter Holt's benefit. Therefore, a claim in contract was available to Carter Holt, albeit an indirect one. However, when Rolls Royce failed to perform Carter Holt chose to sue Rolls Royce in negligence, giving rise to a tortious

⁴⁶³ Tobin, above n 450, 13, 19.

⁴⁶⁴ Stephen Todd, 'Latent defect in property and the Limitation Act: A defence of the discoverability test' (1983) 10 *New Zealand Universities Law Review*, 311.

⁴⁶⁵ James, above n 451, 132, 135.

⁴⁶⁶ Martin, above n 335, 116, 124.

⁴⁶⁷ Hoyano, above n 386.

⁴⁶⁸ [2005] 1 NZLR 324 (CA)

claim across a contractual matrix. It also claimed, on the basis of *Hedley Byrne*, that Rolls Royce owed a duty to take care in making statements and giving advice about the plant. The main damages sought were for loss of profit from not being able to sell electricity.

The Court of Appeal held Rolls Royce owed Carter Holt Harvey no duty of care as pleaded and struck out the claim except in so far as it could be pleaded to relate to allegations of actual physical damage and to allegations of there being a special relationship between them. The Court noted that here there were no allegations of physical damage, latent defects or dangerous defects. The contractual matrix figured highly in the duty of care inquiry, along with other policy factors pointing in the same direction. The Court noted that the parties were sophisticated commercial parties with equality bargaining power, they should be able to look after their own interests and there should be no need for court interference. Besides that, Carter Holt Harvey had chosen not to enter a direct contract with Rolls Royce and the contractual structure was very detailed. In such circumstances, liability would not be recognised in Australia, the United Kingdom, Canada and most of the United States.

Whether a duty of care in tort will arise in a commercial context involving a contractual matrix looks increasingly unlikely in New Zealand. As this case confirms it will certainly not arise where the duty in tort is pleaded as a duty to take reasonable care to ensure that contractual obligations are performed under a contract to which the plaintiff is not a party. The Court of Appeal has expressed in no uncertain terms its reluctance to go down this route.⁴⁶⁹

Todd submits that looking at the matter broadly there is no doubt that the decision is right and that this is a typical case where the remedy must be sought in contract and contract alone. He recognises that the objections to a negligence duty are real and compelling; however, he calls the attention to the need to reconcile the present case with *Hamlin v Invercargill* where he feels there is no tidy solution.⁴⁷⁰

⁴⁶⁹ Andrew Beck, 'Contract', [2005] *New Zealand Law Review*, 53, 66. In *Te Mata Properties Ltd v Hastings District Council* [2009] 1 NZLR 460, NZCA, the Court of Appeal recently upheld the High Court's decision to strike out a leaky building claim against the District Council. The court concluded that the council did not owe a duty of care to the owner of a motel as it was a commercial property. Also in *Queenstown Lakes District Council v Charterhall Trustees Ltd* [2009] 3 NZLR 786, NZCA the Court found that Charterhall was not "vulnerable" like a home owner and that the purpose of the Building Act was not to protect the value of buildings or income streams for commercial investors.

⁴⁷⁰ Stephen Todd, 'Tort' [2004] *New Zealand Law Review* 585, 590.

2.4 Residual categories of claims.

2.4.1 Disappointed beneficiaries.

One particular variety of pure economic loss is the so-called disappointed legatees or frustrated beneficiaries. In *White v Jones*⁴⁷¹, a testator (Mr. Barratt) had a will drawn up after a family quarrel excluding his two daughters from his inheritance. However, within a few months the parties were reconciled, and Mr Barratt gave instructions over the phone to his lawyer to prepare a new will, which would leave each daughter a legacy of £ 9,000. Unfortunately the solicitors waited several months before carrying out these instructions, and before any substantial work had been done Mr Barratt had died, as a result of a fall while on holiday. The beneficiaries brought an action in negligence against the solicitor, to recover the money they would have received under the will.

It was held that a solicitor retained to draw up a will, but who fails to do so before the testator's sudden death, may owe a duty in tort to disappointed beneficiaries, with the result that they can claim the value of their lost legacies from the solicitor if they can establish fault.

The claim posed a number of conceptual difficulties, mainly that: (a) the solicitor's contractual duty was owed only to his client, the now dead testator; (b) the plaintiffs' action, being founded on economic loss, could succeed only on the basis of some form of application of *Hedley Byrne*; yet, there was no obvious assumption of responsibility towards them and, still less obviously, any corresponding reliance on their part; (c) if liability were to be imposed, establishing clear and manageable limits to such liability would be extremely difficult.

The earlier factually similar case in the daughter's favour was *Ross v Caunters*⁴⁷², but that was a merely first instance decision and in the light of the restrictive attitude towards liability for pure economic loss taken by the House of Lords in *Caparo* and *Murphy*, there was much doubt about whether it would survive a direct challenge. There were many reasons why a negligent solicitor should be liable, in particular, the 'strong impulse for practical justice' to remedy the fact that the only persons who might have a valid claim (the testator and the estate) had suffered no loss and the only persons who had suffered a loss (the disappointed beneficiaries), had no claim. Another point, emphasized by Cooke J in *Gartside*

⁴⁷¹ [1995] 1 All ER 691, HL

⁴⁷² [1980] Ch 297.

*v Sheffield Young & Ellis*⁴⁷³ was the role played by solicitors in society as, in practice, public relies on them to prepare effective wills.

Lord Goff, after summarising the conceptual difficulties, held that the *Hedley Byrne* principle should extend in cases such as *White*, this is, that the assumption of responsibility by the solicitor towards his client should extend in law to the intended beneficiary.

Lord Browne-Wilkinson observed that, although reliance is an essential element in a case based on negligent misstatement or advice, it was not necessary in the case of a special relationship if careless conduct can be foreseen as likely to cause and does in fact cause damage to the plaintiff.

Lord Mustill, in a strong dissent (with Lord Keith concurring) said that legal fault cannot exist in a vacuum; the person who complains of it must do so by virtue of a legal right and that the purpose of the courts when recognising tortious acts and their consequence is to compensate those plaintiffs who suffer actionable breaches of duty, not to act as a second-line disciplinary tribunals imposing punishment in the shape of damages. He said that for the duty to arise, there had to be an element of reciprocity in the relationship between the parties, close to a bilateral relationship. Even if there was not technically a contract, each side had to do something. In that sense, in his opinion, *White* lacked all such reciprocity. It was a one-sided relationship which was insufficiently like a contract for there to be recoverable economic loss.

Lord Keith said that *Hedley Byrne* provided a narrow exception to the rule against recovery of economic loss, an exception that depended on the presence of reliance and a 'close relationship' of 'proximity' between plaintiff and defendant. Since there was neither reliance nor 'close relationship' between the beneficiaries and the solicitor, he would have found for the defendant.

There is a certain consensus that *White v Jones* does make clear at least three crucial principles: (a) a duty to avoid economic loss is confined to special relationships within which the defendant has assumed responsibility for protecting the plaintiff's economic welfare; (b) such a relationship will arise only where the plaintiff is readily identifiable as an individual or a member of a class of persons for whom the defendant undertakes responsibility in the performance of a particular task; (c) extended *Hedley Byrne* relationships are not confined to negligent misstatements and careless advice. Provision of services may create a special

⁴⁷³ [1983] NZLR 37.

relationship in appropriate conditions. Reliance is not an essential ingredient of a special relationship.⁴⁷⁴

Potentially, *White* could have launched a significant expansion of the ambit of professional liability for economic losses to a non-client, but it has not done so. Instead, it has served as an authority for the courts to focus such liability on cases where there is, as Lord Goff put it, a ‘lacuna in the law’. Such expansion of the law proposed by the majority through the notion of ‘assumption of responsibility’ has been considered intellectually troublesome and not likely to appeal to academic lawyers because of the inherent vagueness of the notion. It has been suggested that deciding the case on classic tort principles might have produced a more sound doctrinal basis for the decision, or even better would have been the contractual explanation.⁴⁷⁵ However, many believe that to invoke contract in *White* would result in running the very real risk of blurring the distinction between tort and contract altogether.⁴⁷⁶

2.4.2 Employment references.

Another variety of pure economic loss which cannot easily be categorised is the liability resulting from inaccurate and negligently prepared employment references. In *Spring v Guardian Assurance plc*⁴⁷⁷, the plaintiff, who had been an insurance representative for the defendant, was dismissed from his position of sales director and office manager. He subsequently sought to sell insurance products for another firm. Under the rules of the regulatory body LAUTRO⁴⁷⁸ the defendant was required to supply a reference. In consequence of the unfavourable reference supplied (described by the trial judge as the ‘kiss of death’) the other company declined to appoint the plaintiff. He brought an action against his former employers on several grounds including negligent misstatement, malicious falsehood and breach of contract.

The House of Lords held that an employer who gives a reference in respect of a former employee owed that employee a duty to take reasonable care in its preparation and would be liable to him in negligence if he failed to do so and the employee thereby suffered economic damage.

⁴⁷⁴ John Murphy, *Street on Torts* (2007) 90.

⁴⁷⁵ Basil Markesinis, ‘Five days in the House of Lords: some comparative reflections on *White v Jones*’.

⁴⁷⁶ Kit Barker, ‘Are we up to expectations? Solicitors, beneficiaries and the Tort/Contract divide.’ (1994)14 *Oxford Journal of Legal Studies*, 137, 144.

⁴⁷⁷ [1994] 3 All ER 129.

⁴⁷⁸ Life Assurance and Unit Trust Regulatory Organization.

Lords Slynn, Lowry and Woolf held that a duty of care arose under the three-part test set out in *Caparo* because (1) it was foreseeable that the harm would occur, (2) the parties were in sufficient proximity, and (3) it was ‘fair, just and reasonable’ to impose a duty of care. As establishing foreseeability and proximity was relatively easy, the real issue arose over the third criterion. The public policy arguments were essentially of two kinds: first, whether recognising a new duty situation would undermine the law of defamation; second, whether the imposition of liability would produce undesirable effects on the quality and supply of references.⁴⁷⁹

In relation to the first aspect, Lord Slynn pointed out that the rule in defamation was established before modern developments in the law of negligence, and that the two torts do not cover the same ground. The essence of a claim in defamation is, he stated, that a person’s reputation has been damaged, whereas a claim that a reference has been given negligently is essentially based on the fact that a job has been lost.⁴⁸⁰ The majority agreed that the existence of a remedy in defamation or injurious falsehood was irrelevant to the availability of a remedy in negligence.

Regarding the concerns that imposing a duty of care on employers in respect of references would lead them to refuse to give references, or that they may give them but reduce the amount of negative, critical information supplied in them, the majority was not impressed (only Lord Keith, in dissent, accepted the argument). Lord Goff, in particular, said that although the recognition of a duty of care might have some inhibiting effect on the way in which references are expressed, he suspected that such an inhibition already exists because employers are often unwilling to indulge in unnecessary criticism of their employees.⁴⁸¹ Lord Slynn thought that while the quantity of references might decrease, the quality and value would be greater, and it was not clear that it was more in the public interest to have more references than to have fewer, more careful references.⁴⁸²

On a different approach, Lord Goff looked to *Hedley Byrne* and the voluntary assumption of responsibility for the source of the duty of care.⁴⁸³ The duty claimed, however, was one owed to the person about whom it was written, not the person to whom it was sent. Therefore, it represented an extension of the *Hedley Byrne* principle that could be justified on

⁴⁷⁹ Chris Hilson, ‘Liability for employment references: the possible effects of *Spring v Guardian Assurance*.’ (1996) 25 *Anglo-American Law Review*, 441, 446.

⁴⁸⁰ [1994] 3 All ER 129 at 159.

⁴⁸¹ At 151.

⁴⁸² At 162.

⁴⁸³ Tom Allen, ‘Liability for references: The House of Lords and *Spring v Guardian Assurance*.’ (1995) 58 *Modern Law Review* 553, 553.

the basis that an employee relies on his employer to carry out this service with appropriate care and that his financial prospects were significantly in the hands of that person. However, as counsel had not argued the case on this basis, he considered his speech of limited authority.

The question of reliance is also problematic because the direct reliance on the statement was by the new employer who rejected the claimant, although, some suggest that there was commonly an element of reliance by the plaintiff, who will have asked for the reference or will at least know that it is likely to be given.⁴⁸⁴ In any event, to distinguish the type of situation in *Spring* from one where the plaintiff actually relies on the statement, it has been suggested that it may be preferable to describe the plaintiff as reasonably depending on his employer to take care in giving the reference.⁴⁸⁵

Fears that *Spring* will fatally undermine the defence of qualified privilege in defamation have been considered questionable. That defence is as broad as it is partly because defamation is a tort to which strict liability applies; it is not necessary to prove fault. Following *Spring*, the defence of qualified privilege will continue to protect employers who do not act carelessly.⁴⁸⁶

2.4.3 Freezing injunctions.

In *Commissioners of Customs & Excise v Barclays Bank Plc*,⁴⁸⁷ the plaintiff obtained a freezing injunction against a customer of the bank, and notified the bank. The bank through 'operator error' made payments out of the account frozen by the injunction. Due to the negligence of the bank, substantial sums were lost and the plaintiff claimed for damages

The issue tested in Barclays was whether Barclays Bank owed a duty in tort not to cause the Customs & Excise Commissioner economic loss by allowing payments to be made out of their clients' accounts which were subject to a freezing order.

The House of Lords unanimously decided that there was no duty of. In the House of Lords, all five of their Lordships giving substantive speeches, unanimously, reversing the

⁴⁸⁴ Winfield & Jolowicz, above n 246, 510.

⁴⁸⁵ Clerk & Lindsell on Torts (2006) 456. Murphy submits that following *Spring* it is also now doubtful whether reliance, in any real sense, is still a prerequisite to invoking the rule in *Hedley Byrne*. John Murphy, 'Expectation losses, negligent omissions and the tortious duty of care'. (1996) 55 *Cambridge Law Journal* 43, 45.

⁴⁸⁶ Markesinis, above n 248, 172.

⁴⁸⁷ [2007] 1 AC 181.

decision of the Court of Appeal held that, as a matter of policy, Barclays did not owe a duty of care to Customs.

The House considered the three tests for liability for economic loss: (1) ‘voluntary assumption of responsibility’; (2) the three-fold test stated by Lord Bridge in *Caparo*; and (3) an incremental ‘test’, based on the observation of Brennan J in *Sutherland Shire Council v Heyman*,⁴⁸⁸ which looks to established categories in which liability has been accepted. After some consideration, the House did not think it necessary to identify a single test for the existence of a duty of care.

Lord Bingham did not think that the notion of assumption of responsibility, even on an objective approach, could aptly be applied to the situation which arose between the Commissioners and the Bank on notification to it of the orders. He said that, of course it was bound by law to comply, but it had no choice. It did not assume any responsibility towards the Commissioners as the giver of references in *Hedley Byrne* (but for the disclaimer) and *Spring*, the valuers in *Smith v Bush*, the solicitors in *White v Jones* and the agents in *Henderson v Merrett* may plausibly be said to have done. He also thought that the *Caparo* threefold test itself provided no straightforward answer to the vexed question whether or not, in a novel situation, a party owes a duty of care and that the incremental test was of little value as a test in itself, and was only helpful when used in combination with a test or principle which identified the legally significant features of a situation. In his opinion, the majority (or majority outcomes) of the leading cases were in every or almost every instance sensible and just, irrespective of the test applied to achieve that outcome. This was not to disparage the value of and need for a test of liability in tortious negligence, which, he said, any law of tort must propound if it was not to become a morass of single instances. But it did, in his opinion, concentrate too much attention on the detailed circumstances of the particular case and the particular relationship between the parties in the context of their legal and factual situation as a whole.

In relation to the threefold test, foreseeability was relatively unproblematic, but the question of proximity was unclear. Lord Rodger held that there was no proximity, Lord Walker implied that it was present, Lord Mance said that the parties were in a ‘most proximate relationship’ and Lord Hoffman did not address the issue. Thus, everything came down to whether the imposition of a duty was ‘fair, just and reasonable’ in all the circumstances.

⁴⁸⁸ (1985) 157 CLR 424, 481.

Lord Bingham mentioned several reasons that could favour the imposition of a duty of care saying that,

‘the Commissioners submitted that the orders were made by the court and notified to the Bank to protect their interests; that recognition of a duty would in practical terms impose no new or burdensome obligation on the Bank; that the rule of public policy which has first claim on the loyalty of the law is that wrongs should be remedied (*X (Minors) v Bedfordshire County Council* [1995] 2 AC 633, 663, 749); that, since there are no facts here which would found a claim for effective redress in contempt, the Commissioners will otherwise be left without any remedy, that a duty of care to the Commissioners would not be inconsistent with the Bank's duty to the court; and that there would, in such a case, be no indeterminacy as to those to whom the duty would be owed. These are formidable arguments and I am not surprised that the Court of Appeal accepted them. But I have difficulty in doing so, for six main and closely associated reasons.’⁴⁸⁹

However, he rejected them for, among others, the following reasons: (a) the *Mareva* jurisdiction has developed as one exercised by court order enforceable only by the court's power to punish those who break its orders. The documentation issued by the court does not hint at the existence of any other remedy. The only duty owed by a notified party is to the court; (b) it cannot be suggested that the customer owes a duty to the party which obtains an order, since they are opposing parties in litigation and no duty is owed by a litigating party to its opponent; (c) that a duty of care in tort may co-exist with a similar duty in contract or a statutory duty, and I would accept in principle that a tortious duty of care to the Commissioners could co-exist with a duty of compliance owed to the court. But I know of no instance in which a non-consensual court order, without more, has been held to give rise to a duty of care owed to the party obtaining the order, and one would have to ask whether a similar duty is owed by the subject of a search order; (d) that no comparative jurisprudence or material from any Commonwealth jurisdiction was referred in support of the Commissioners' argument; (d) it seemed to him, in the final analysis, unjust and unreasonable that the Bank should, on being notified of an order which it had no opportunity to resist, become exposed to a liability which was in this case for a few million pounds only, but might in another case be for very much more. For this exposure it had not been in any way rewarded, its only protection being the Commissioners' undertaking to make good (if ordered to do so) any loss which the order might cause it, protection scarcely consistent with a duty of care owed to the Commissioners but in any event valueless in a situation such as this.

Lord Hoffman thought that there was a compelling analogy with the general principle that the law of negligence does not impose liability for mere omissions. He said that it was true that the complaint was that the bank did something: it paid away the money, but the

⁴⁸⁹ [2006] 4 All ER 256 at 267

payment was alleged to be the breach of the duty and not the conduct which generated the duty. The duty was generated *ab extra*, by service of the order. The question of whether the order could have generated a duty of care was comparable with the question of whether a statutory duty can generate a common law duty of care and the answer is that it cannot.

Lord Rodger said that the policy of the law is that a third party, such as a bank, which is notified of a freezing order, must not knowingly undermine the court's purpose in granting the order. If this is all that the court which makes the order can demand, it would be inconsistent to hold that, by reason of the selfsame notification, the applicant could simultaneously demand a higher standard of performance from the bank - and then claim damages for the bank's failure to achieve it. Notification imposes a duty on the bank to respect the order of the court; it does not of itself generate a duty of care to the applicant.

CHAPTER 4: THE CIVIL LAW.

2.1 Economic loss in Germany.

2.1.1 Generally.

As we have already shown in the previous chapter, the German legislative deliberately choose not to follow the *neminem laedere* general principle established in the French code. The extreme generality and flexibility of art. 1382 CC, which contributed to its popularity with almost all modern legislators, struck the Germans as very dangerous. For them, such an amorphous conception of liability not only invited litigation, it also placed far too heavy a burden on the shoulders of the judges. In German tort law, liability is only attached in certain typical situations of wrongful invasions of protected rights or legal interests (*Rechtsgüter*), a solution traditionally associated with Roman law and common law. In effect, in both of these systems, there was a list of actions that a person could bring against the one who had injured him.

The protective scope of tort law which creates liability towards everyone is limited to rights which are considered to be fundamental such as life, body, health, freedom, property or ‘other right’ of the victim. A clearly policy choice has been made by the drafters of the BGB to leave pure economic loss (*reiner Vermögensschaden*) as such outside the list of interests protected by § 823(1). In German law, as a basic rule, pure economic loss is not recoverable in tort. In this sense, both German and English law share a fundamental reluctance to allow tort claims based on interferences that do not result in material damage to a piece of property. Economic loss can be compensated under § 823(1) only if it flows from an injury to one of the legal interests specified in that provision.⁴⁹⁰ On the contrary, if culpable behaviour causes the victim only pure economic harm unrelated to any personal injury or damage to his property or the invasion of any ‘other right’, no claim can arise.⁴⁹¹ As is generally the position in common law, only the subject of the proprietary right himself can sue, not a third party suffering consequential loss.

⁴⁹⁰ Christian Von Bar, *The Common European Law of Torts*, Vol. II (2000) 161.

⁴⁹¹ By contrast, the Austrian Supreme Court accepts claims of actual diminution of value of property. In a recent case, the plaintiff’s house was put to risk by excavations in the foundations of a neighbouring property. In assessing damages for negligence, the Court took into account the loss value caused to the house by the threat of future damage to it, calculating it as the difference between what a fictional buyer would have paid for the house not knowing about the problem, minus the actual market value of the house. Efstathios Banakas, ‘Tender is the night: economic loss-the issues’ in Banakas (ed), *Civil liability for pure economic loss* (1996) 19.

Although rights of property are specifically mentioned in § 823(1) of the German civil code, there is a considerable debate trying to explain the basis of the link of unlawfulness between the defendant's negligence and the plaintiff's damage when the invasion of the plaintiff's property rights is only indirect.

The typical factual situations is well represented by the so-called cable cases where contractors negligently damage electricity cables and as a result the claimant's manufacturing operations are interrupted for a period of time suffering economic losses. Liability under § 823(1) arises in cases like that if material damage is inflicted on property, irrespective of whether such damage was a direct consequence of the negligent act or occurred only through a causal chain. If, on the other hand, all that happens is that the machinery stops and the factory's output is reduced, the factory cannot claim the loss of profits since only an economic loss (*reiner Vermögensschaden*) has been caused.

A considerable consensus has been achieved today in Germany that this statutory structure no longer responds adequately to the changed social and economic conditions of present times. The emphasis on land and tangible property as the main basis of economic welfare, though prevalent when the BGB was drafted, now seems outmoded. It is considered that there are significant signs, economic and legal, that suggest that nowadays rights and financial claims have moved into the centre of private wealth.⁴⁹²

The distinction between consequential loss upon physical damage to property and pure economic loss is not very convincing from the point of view for the floodgates either, as can be shown from an Austrian case. A person, when cutting a tree, interrupted the neutral conductor of a circuit line thereby causing an excess voltage in the power supply system, which caused damage to the plaintiff's electrical appliances.⁴⁹³ No doubt, that excess voltage may cause much higher damage to electrical appliances than may result from a loss of production, if a great number of expensive devices are affected (a whole neighbourhood or maybe even a city).

In 1964, the German Supreme Court decided a typical cable case where, because of the negligently cut that affected some egg incubators of the plaintiff, instead of the expected 3.000 chicks, only a few were produced and they were unsalable. It was held that the loss of

⁴⁹² Michael Coester and Basil Markesinis, 'Liability of financial experts in German and American law: An exercise in comparative methodology.' (2003) 51 *American Journal of Comparative Law* 275, 278.

⁴⁹³ Bernd Schilcher and Willibald Posch, 'Civil liability for pure economic loss : an Austrian perspective' in Banakas above n 491, 170.

income flowing from this damage to the eggs was recoverable from the defendant under § 823(1) BGB.⁴⁹⁴

The Court reasoned that if something requires the constant supply of water, electricity or the like in order to retain its substance and keep it from spoiling, any disturbance of the supply has the effect (in the legal sense) of annihilating that thing if it destroys it by cutting off the supply. Such things include all products which need an electrically-maintained constant temperature (heating or cooling) in order not to spoil. If such products are spoiled as a result of electricity cables being culpably severed and this reduces or destroys the sales value of the product, the material loss simply constitutes consequential damage arising out of property damage which is to be compensated for under § 823(1) BGB. The position is different where the power cut does not cause things to be destroyed, but merely causes the production of particular products to be temporarily interrupted. That is pure economic loss (*reiner Vermögensschaden*).⁴⁹⁵

2.1.2 Economic loss and the ‘right of an established and operating business’ (Recht am Gewerbebetrieb).

A clear expression of the desire of German law to mitigate the basic reluctance to compensate pure economic loss can be seen in the creation by the *Reichsgericht*⁴⁹⁶ first and the expansion by the *Bundesgerichtshof* later, of a sort of general right that relates to the running of a business. The German Supreme Court, intending to protect commercial enterprises against the infliction of certain types of rather vaguely defined interferences with their economic interests, developed a judge-made right which can be described as the interest of the owner of an existing business in that business as a going concern. (*Recht am Gewerbebetrieb*). The recognition of this right is subject to there being an established business (meaning that it has the resources to be carried out), as well as to the condition of

⁴⁹⁴ BGHZ 41, translated by R. Bray in Walter Van Gerven, *Tort Law. Scope of Protection*. (1998) 225.

⁴⁹⁵ On the contrary, the Swiss Supreme Court usually compensates for ‘distant damage’ in cases of cable cutting. In order to arrive at this result the Court created *Passende Schutznormen* (adequate protective provisions). Thus, in the case of a water pipe damaged by the army and in the case of a cable damage by a building constructor, art. 239 of the Swiss Criminal Code was regarded to be a protective provision in favour of the client. According to this provision ‘the threat to, interference of, or endangering of the operation of a device or plant for the public supply of water, light, power and thermic energy’ is punishable. In the opinion of the Supreme Court, the single client is also protected by this provision. Cf. Bernd Schilcher and Willibald Posch, above n 495, 174. Also Franz Werro, ‘Tort liability for pure economic loss: a critique of current trends in Swiss law’ in Banakas (Ed) above n 491. *Pure Economic Loss in Europe*. Bussani and Palmer (Eds.) (2003)198. von Bar, above n 490, 38, note 188.

⁴⁹⁶ The German Supreme Court until 1945.

being active, that is, not simply dormant.⁴⁹⁷ The concept only includes commercial business, excluding professional activities or crafts. Business interests, therefore, had been elevated to a rank similar to that of property right. The most recent case law, however, has cut down the scope of compensation to business harm ‘integral or related to business’; that is, the conduct of the defendant must in some way be directed against the business as such, and not simply affect rights or legal interests which can be detached from the enterprise without difficulty such as personnel, equipment, stock, etc.⁴⁹⁸ The recognition of this new ‘other right’ has not gone without criticism and many authors believe, not only that this right conflicts with the basic structure of German tort law, but also that its creation was superfluous, since in most cases another basis could have been found to reach the same result.⁴⁹⁹

The court’s intention to keep matters within manageable bounds was expressed through the requirement that the interference with the established and operating business be ‘direct’ before it can become actionable under that heading. The lack of definitions of the notion of ‘direct interference’ by the decisions of the courts resulted in serious difficulties in drawing the line between direct and indirect interference. In the case of such complex legal term as enterprise, the difficulties became so particularly great that it has been suggested that the requirement should be abandoned and that instead the effect of that interference upon the sphere of activity should be decisive. This appears to be connected with the acceptance of a teleological theory propounded by Rabel, according to which one must take account of the protective function of the rule which imposes the duty to make compensation.⁵⁰⁰

The Supreme Court has pointed out that the question as to when interference with the right in an established and active commercial or industrial enterprise is direct cannot be answered by references to the purely linguistic distinction between ‘direct’ and ‘indirect’ nor by relying on the doctrine of causality alone, or the absence of so-called intermediate causes. The Court refers to Larenz who had argued that whether an interference is direct must be determined teleologically, i.e. in the sense that the act of interference must have the purpose of restricting the commercial or industrial activity, and that, consequently, the purpose must disclose the direction towards inflicting damage upon the commercial or industrial enterprise.

⁴⁹⁷ Van Gerven, above n 494, 39.

⁴⁹⁸ Jacques Herbots, ‘Economic loss in the legal systems of the continent in Michael Furmston (Ed) *The law of tort* (1986), 147. Markesinis suggests that this formula is nothing but an empty shell of words and that the courts should attempt more openly to weigh the reciprocal interests rather than to indulge in the creation of opaque formulae. B S Markesinis, *The German Law of Obligations. Volume II. The Law of Torts: A comparative introduction*. (1997), 62.

⁴⁹⁹ Van Gerven, above n 494, 230.

⁵⁰⁰ Konrad Zweigert and Hein Kötz, *Introduction to Comparative Law* (1998), 602.

However, the *Bundesgerichtshof* expressed its disbelief of this theory by saying that the limitations of this suggestion become immediately obvious when the interference is due to negligence.

a) In a leading case, directly related to the expansion of the notion of ‘other rights’ to include the right to an established and operating or active business (*Recht am Gewerbebetrieb*), the Supreme Court of Germany (BGH) had to decide the claim of a company that could not operate for some time because someone negligently working with an excavator had damaged an electricity cable in the neighbourhood of the company’s premises. The plaintiff claimed that the power cable formed part of its business from an economic point of view and that the defendant, through his negligence, had interfered illegally and culpably with its business and should be liable for the loss caused by the interruption of production. The defendant argued that the plaintiff’s business had been only indirectly affected by the cutting of the cable and that only direct interference would rendered him liable.

The Supreme Court held that the claim should fail. The reasons given were that direct interference with the right in an existing commercial or industrial enterprise, against which § 823(1) provides a remedy is only that which is somehow directed against the enterprise as such. Therefore, just as an injury to an employer or the destruction of or damage to a lorry belonging to an enterprise is not specifically connected with the enterprise, the cutting of the cable by the defendant or his employee operating the excavator was not so connected either. The supply of electric current by a cable and the right to receive it, said the Court, did not constitute an essential element of an established and active commercial or industrial enterprise but rather constituted a relationship based on the duty to supply energy on the part of the supply companies, which is of the same nature as the relationship with other consumers of electricity. If such rights or interests were included, then contractual rights (such as a contract for the supply of power) would come under the protection of § 823(1) contrary to the intention of the drafters of the BGB.⁵⁰¹ Consequently, the fact that a cable had been damaged on land not belonging to the enterprise affected resulting in a cut in the electricity supply could not, in the absence of special circumstances which did not exist in that case, be regarded as an interference aimed at the area of operation of the enterprise concerned. In the BGH’s opinion, to do so would exceed the range of protection accorded to commercial or industrial enterprises by the practice of the courts.⁵⁰²

⁵⁰¹ Van Gerven, above n 494, 229.

⁵⁰² Bundesgerichtshof (Sixth Civil Division) 9 December 1958. BGHZ 29, 65 translated in van Gerven, above n 475, 228 .

b) The Federal Supreme Court, in 1976, ratified the view that, as a rule, there is no liability for indirect damage (economic damage that a third party suffers by mere reflex operation through injury to another's property).⁵⁰³

The defendant company, which ran a building enterprise, was carrying out excavations on a private property when it negligently damaged an electric cable causing a 27-minute interruption of the power used in the plaintiff manufacturing business.

It was held that the claim could find no support in § 823(1), for no property of the plaintiff had been damaged and no legal injury was done to the plaintiff's right of an established and active business, since there was no direct interference with it. Again, the Court expressed the opinion that the requirement of 'directness' was essential if the protection provided by case-law in the event of a violation of the right of an established and active business was not to be enlarged into a general delictual rule for the protection of traders. The floodgate concern is openly revealed by the Court recognizing that matters could not be different in the case of power cuts that affect everyone and which are liable to cause widespread financial loss to persons who do not exercise any trade and to whom the general law of delicts affords no claim for damages.

In this case also, the attempt to base liability under § 823(2) failed. Under this heading, the BGB imposes an obligation to compensate for any violation of a statutory provision intended for the protections of others in the following terms:

§ 823 (1) A person, who wilfully or negligently injures the life body, health, freedom, property or other right of another contrary to law is bound to compensate him for any damage arising therefrom.

(2) The same obligation attaches to a person who infringes a statutory provision intended for the protection of others. If according to the purview of the statute infringement is possible even without fault, the duty to make compensation arises only if some fault can be imputed to the wrongdoer.

The plaintiff argued that the defendant had violated a building regulation which constituted a breach of an enactment designed for the plaintiff's protection. According to the claimant, § 18(3) of the Baden-Württemberg Building Regulations stated that 'Public spaces, supply, run-off and warning apparatuses and also hydrants, survey marks, and boundary marks must be protected during the process of building and, where necessary, be kept accessible subject to the necessary precautions.' The Court declined the invitation to consider

⁵⁰³ Bundesgerichtshof (Sixth Civil Division) 8 June 1976. BGHZ 66, 388 translated in Markesinis, above n 478, 180. The Swiss Bundesgericht, on the other hand, holds that economic harm due to stoppage of the business is compensable, emphasizing that negligent interruption of a power cable operated by a public utility is a punishable offence under art. 239 of the Swiss Criminal Code. Zweigert and Kötz above n 500, 601.

§ 18(3) of the Regulations as a protective enactment for the purposes of § 823(2). In its opinion, the referred Statute, when regulating building, did not intend to afford to electricity users an abnormal individual protection when a cable was damaged. There was nothing to show that an arbitrary individual protection was aimed at, alien to federal law and as part of a generally inappropriate set of regulations. The Baden-Württemberg Building Regulations, as a whole, belonged to the law of public security and the language of that provision contemplated damage only to things, not to persons. In the Court's opinion, § 18(3) could not be assumed to afford electricity users a claim to compensation since it would lead to a great and intolerable extension of liability. Although the Court recognized that admittedly, most rules of a public law character operate, in a general way, to protect interest of individual citizens, it does not follow that that general operation also specifies the cases where a protective enactment in question affords him an individual protection. If the protective function of the rule is not indicated, the creation of an individual claim for compensation would be admissible if it appeared meaningful, sensible and tolerable in the light of the whole system of liability. Only by doing so, said the Court, the undesirable effect of undermining Parliament's ruling against a general liability for purely economic loss would be avoided.

c) In 1977, another typical cable case where plaintiff put forward alternatively also a contractual claim, did not attract the sympathy of the Supreme Court either.⁵⁰⁴ The underlying facts were that before earth removal operations required in the construction of an aqueduct and reservoir of the city started, representatives of the parties had a meeting on site with representatives of the water authority and the city. The plaintiff's business manager and the city representative drew attention to the presence of the main electric cable where the earthworks were about to begin and stressed how important it was for the plaintiff's business not to damage it. The defendant's clerk was then told that any digging in the neighbourhood of the cable must be done by hand rather than by machine.

The Supreme Court stated that the Court of Appeal had analysed those facts correctly and that its holding that the plaintiff was not drawn into the protective ambit of the contract of services between the water authority and the defendant could not be criticized. Although recognizing that persons not immediately involved in a contract may have a contractual claim for damages if they suffer harm owing to faulty conduct by the debtor in breach of contract, they emphasized that that depended on the meaning and purpose of the contract and its

⁵⁰⁴ Bundesgerichtshof (Sixth Civil Division) 12 July 1977. *Neue Juristische Wochenschrift* 1977, 2208. English version by Tony Weir in Markesinis, above n 248, 184.

construction in accordance with the principle of good faith. They emphasised that the court had frequently observed that the duties of care and protection can only be extended beyond the actual parties to the contract if the principal creditor (in that case in particular, the water authority) had some responsibility for the well-being of the third party, as owing him protection and care. It was necessary to take this view, in order to avoid blurring the line between contractual and tortious liability contrary to the will of the legislature and to prevent an intolerable extension of contractual duties of care beyond what the principle of good faith can demand of the debtor of the contractual performance.

The water authority was in no way responsible for the well-being of the plaintiff. For the contractual creditor, the plaintiff was only one of a large number of subscribers that could be affected by damage to the cable. The mere fact that the plaintiff's business was apt to suffer a considerable economic loss through interruption of the electricity supply did not justify holding that the water authority must look out for its well-being.

The Supreme Court did not consider that the meeting on site modified the contract of work between the defendant and the water authority either. They said that the water authority was bound to give such instructions before the work started in order to enable the defendant to take the necessary steps to protect the utility cables. The special reference to the harm the plaintiff might suffer if the current were interrupted was insufficient to bring it within the protective area of the contract.

2.1.3 Economic loss resulting from interference with the use and enjoyment of property.

Another sign of the desire of German law to mitigate the basic reluctance to compensate pure economic loss is the acknowledgment that the protection afforded by § 823(1) encompasses not only the material integrity of the property that is owned, but also to a certain extent its use and enjoyment.

This can be illustrated by the famous leading case, known as the *Fleet case* decided by the Supreme Court in 1970.⁵⁰⁵ The defendant, the Federal Republic of Germany, was the owner of a navigable channel which connected a mill to a port and was registered as a federal waterway. A part of the badly maintained bank collapsed, taking part of the external wall of a house with it. The house had to be secured by means of two tree trunks which were fitted just

⁵⁰⁵ Bundesgerichtshof (Sixth Civil Division) 21 December 1970. BGHZ 55, 153.

above and across the surface of the canal, confining a plaintiff's vessel to the mill for about nine months. Another three vessels, also belonging to the plaintiff, could not approach to the mill in order to carry goods.⁵⁰⁶

The Supreme Court held that the defendant was liable to pay compensation for the economic loss suffered by the plaintiff arising from the immobilization of the vessel due to the closure of the waterway leading to the mill for repair work. The ship that had been moored to take goods for transport under a contract with the owner of the mill, although remaining intact was unavailable to be used for transportation.

In relation to the contention that there had been an interference with the right to an established and operating or active business it was held that this claim is subsidiary in character and it applied only if no other remedy exists and, in that case, property of the plaintiff had been damaged inasmuch as the vessel had been forced to remain at the loading stage of the mill due to the closure of the channel. The Court emphasized that property is damaged not only if the substance of an object is adversely affected, but also by any other actual interference with the right of an owner. The 'imprisonment' of the ship, eliminating it as a means of transport, constituted a factual interference which affected the rights of the plaintiff as an owner. Besides, the Court held that no direct interference with the plaintiff's enterprise had taken place. The navigability of a waterway could not be considered within the ambit of the commercial enterprise of a person engaged in shipping. A temporary closure of a waterway which also concerns others engaged in shipping did not interfere with the plaintiff's commercial enterprise. The fact that the closure had temporarily prevented him from complying with his contractual obligations towards the mill did not mean either that the navigability of the waterway had to be regarded as falling within the sphere of the plaintiff's commercial enterprise, no matter how important this was as part of his commercial activities.

In relation to the other three vessels, also belonging to the plaintiff, which could not approach the mill in order to carry goods, the Court said that the answer had to be different. To this extent, the defendant was considered not to have interfered with the plaintiff's property for the reason that the ships were not affected in their capacity of means of transport by the closure of the channel and were thus not diverted from their natural use. The restriction of the plaintiff in the enjoyment of the common use of the channel was the same as

⁵⁰⁶ Some similarities with the old English case *Rose v. Miles* (1815) 4 M & S 101; 105 ER 773 have been found. In this case, a barge-owner navigating a creek obstructed by the defendant's barges was allowed to claim his extra costs for unloading the cargo from his barges and transporting it by land to its ultimate destination, since in Lord Ellenborough's view he had suffered greater damage than other members of the public who might have been contemplating using the creek.

all others' who engage in shipping. Such common use was not 'another right' in the meaning of § 823(1) BGB.

The difference in treatment has been explained by Larenz and Canaris by distinguishing between 'lock-in' and 'lock-out'. In the first situation, the ship could not be put to other uses, as it was immobilized at the mill and could not go elsewhere. In the second situation, the three other vessels were not prevented from moving, but only from reaching the mill. They could be put to use to fulfil other contracts. The focus was on the relationship between the damage and the purpose of protection which leads to a distinction between interference with the substance of property and with the ability to use it for a particular purpose. In the case of the locked-in ship, the owner was for all intents and purposes deprived of its ownership, since the property could not be used at all and had become worthless (even if only temporarily). The core of ownership was affected, and such loss bears a relationship to the protective purposes of § 823(1). On the other hand, the owner of the locked-out vessels was merely deprived of the possibility of making use of a public waterway, he could, nonetheless, use his goods for another purpose.⁵⁰⁷

In spite of the similarities with the channel case, the *Bundesgerichtshof* has also held that the owner of land whose access by public road was blocked for a few hours has no claim for violation of property right.⁵⁰⁸ There is general coincidence in doctrine that drivers who get stuck in traffic jams as a result of an accident caused by someone else's negligence cannot recover for opportunities which in consequence they have lost. The reluctance to allow claims in cases of traffic jams is clearly motivated by the fear of an undue expansion of liability. Bussani and Palmer suggest that it is not at all inconceivable to conclude that a person caught in a traffic jam with his vehicle suffers a loss of freedom, and that damages resulting from such loss of freedom are covered by § 823(1). But such a decision would lead to boundless liability of everyone who causes an accident on Germany's crowded roads, and it would unleash a flood of lawsuits. Thus, the Supreme Court has indicated (although somewhat vaguely) that the loss of the use of public highways or a short-term blockage of access is part of the general risk that everyone must bear.⁵⁰⁹

⁵⁰⁷ Karl Larenz and C Canaris, *Lehrbuch des Schuldrechts, Vol II* (1994) at 388, apud Van Gerven, above n 494, 224.

⁵⁰⁸ BGH Neue juristische Wochenschrift 1977, 2264.

⁵⁰⁹ Bussani and Palmer, above n 495. A different solution was given by the Italian Supreme Court in the *Pirola* case, where a highway was closed due to a truck that overturned and caught fire because of the driver's negligence. The Court held the truck driver liable because the damage caused to the plaintiff had been directly caused by the former's negligence. Corte di Cassazione, sezione civile, 16.10.1991. In England, civil liability may arise from public nuisance, but particular damage, over and above the inconvenience or damage to the public at large, must be shown.

2.1.4 Economic loss and contract remedies.

A peculiarity in German law, less observed in other civil law countries, is the wide use of contract remedies in solving questions of pure economic loss. The reasons for contract's enlarged role seems to be twofold: on the one hand, apart from rules permitting the concurrence of tort and contract actions, tort law is considered too weak and narrow to safeguard all financial interests that merit legal protection. On the other hand, contract claims appeared to be a relatively safer path to those who dread unleashing the floodgates of tort, since there is certainly less danger of boundless damages occurring in breach of contract situation.⁵¹⁰

In this regard, one of the main instruments is the so-called 'contract with protective effects for third parties' (*Vertrag mit Schutzwirkung für Dritte*), a concept developed by analogy to the classical form of contracts for the benefit of third parties regulated in § 328.⁵¹¹ This device allows bringing strangers to a contract under its umbrella and permits them to sue a promisor for breach of one of the contract's secondary obligations, in particular, some breach causing purely financial harm to the plaintiff. This contractual liability towards third parties is not easy to fit into the legal system and is fuel for a strong debate among scholars.⁵¹²

The function of the 'contract with protective effects for third parties' is considered tort-like in the sense that the protected third party need not stand in a close personal relationship to the injurer nor be specifically identified in advance. At the same time, it is operationally free of the absolute rights requirement of German tort law and permits recovery of pure economic loss.⁵¹³

⁵¹⁰ Vernon Palmer and Mauro Bussani, 'Pure economic loss: the ways to recovery', *Electronic Journal of Comparative Law*, Vol. 11.3, 2007, 62.

⁵¹¹ § 328. Contract for the benefit of third parties

(1) Performance to a third party may be agreed by contract with the effect that the third party acquires the right to demand the performance directly.

(2) In the absence of a specific provision it is to be inferred from the circumstances, in particular from the purpose of the contract, whether the third party is to acquire the right, whether the right of the third party is to come into existence immediately or only under certain conditions, and whether the power is to be reserved for the parties to the contract to terminate or alter the right of the third party without his approval.

⁵¹² Cees van Dam, *European Tort Law* (2006), 173.

⁵¹³ A well-known example is the case decided by the *Reichsgericht* in 1930. A tenant contracted with a repair firm for the repair of a gas water-heater which was in the dwelling, and owing to the fault of the gas-fitter, the heater exploded and caused injuries to the cleaning woman employed by the tenant. The Court held that the victim had a contractual claim against the repair firm. The consideration was that third parties are to be brought within the protective ambit of a contract if the duty of care and protection arising from the contract should be owed, in good faith and in accordance with the purpose of the contract, not only to the contracting party but also to certain other persons. The sole purpose of the decision was to put the victim in a better position than if his only claim for damages were based on tort. Under German law, with regard to prescription, burden of proof and

One of the areas in which this ‘contract with protective effects for third parties’ device is applied is the liability of auditors towards third parties. The courts had developed this notion, extending substantially the personal scope of contractual duties. Through this expansion, the risk of the debtor is increased substantially: potential plaintiffs multiply and the duties and potential liabilities are enlarged.

Initially, cases regularly involved constellations where one contracting party had particular, especially personal ties, to the third party. For cases where relatives (minors) of contracting party (A) were harmed or else incurred damages by the other contracting party (B), the Court applied a ‘care’ standard between A and his minor or another close person in order to extend the contractual obligations owed to A by B to the third person. In even earlier cases, the *Reichsgericht* held that a tenant was protected by the contract concluded between the landlord and a craftsman if the tenant incurred any damages from this contract. The basis for this jurisprudence was the existence of particular ties of a personalised nature between the contracting party and a third party, *e.g.* family, employment or landlord-tenant relations. To prevent, however, an unlimited extension of contractual rights to third parties, the Court regularly required that the third party be ‘in proximity’ to the specific contract, meaning that it would be in the nature of the contract that a third party could in some way be affected by it. Later, the Court built on these considerations requiring that the protection of the third party could be identified as being in the interest of one of the contracting parties and that it was the parties’ will to extend the contract’s reach to the third party. In the context of false statement by experts, in particular, the Federal Supreme Court decided to extend it significantly.⁵¹⁴ The expansion weakened both requirements: a) physical injury started to look inadequate for modern mass transactions, so the potential damage was said to include damage to property and economic loss; b) the relation between the creditor and the third party need not to be a personal one: a contractual duty of care between them would suffice.

In a seminal decision, the Supreme Court held an accountant who conducted a mandatory audit for company A, liable to the owner of company B who purchased it by relying on his erroneous assessment of the financial situation of A.⁵¹⁵ Coester and Markesinis consider this decision remarkable in the light of the fact that such cases are governed by §

especially vicarious liability (far too rigid and favourable to employers), a victim is in a much better position to claim damages if he can claim in contract for the harm he has suffered. Herbots, above n 498, 151.

⁵¹⁴ Coester and Markesinis, above n 492, 281.

⁵¹⁵ BGHZ 138, 257. *Neue Juristische Wochenschrift*, 1998, 1948.

323 (1) of the German Commercial Code which provides that if the auditor negligently fails in his duties he is liable only to the company in question.⁵¹⁶

The Court agreed that, in that case, the principle of contracts with protective effect for third parties could be applied and stated:

...there are no difficulties about also applying these principles in cases in which an auditor of accounts is entrusted with the compulsory audit of a company provided that it appears sufficiently clear to him that on this audit a particular work product is wanted from him which is to be used against a third party who trusts in his expert knowledge.⁵¹⁷

However, it has been consistently said by the Court that there has to be special reasons to believe that the parties to the contract intended to protect the outsider in question. This requires that the statement be made, at least *inter alia*, for the benefit of the third party, and that the defendant has reason to know that. According to Bussani and Palmer, the Supreme Court draws the line between two kinds of cases. In the first kind, the business owner hires accountants and other experts, but their work product also serves someone else, such as a potential buyer. If they are aware of that, they should know that errors in their statements are likely to injury a non-party as well. In such cases, it is fair to hold them liable to third parties. In the second kind, they are hired for general purposes, e.g. to perform an audit which is statutorily required. In these cases, they serve only their party in contract but have nothing to do with outsiders who rely on these accountants at their own peril.⁵¹⁸

An example of the first situation is the so-called ‘group of buyers case’. An expert was requested by a prospective buyer to give a statement on the value of an apartment which he, or one of the group of interested persons behind him, was considering to buy. Some members of this group, including the plaintiff, were present when the expert received the order. After the expert delivered his opinion to the one who had contracted with him, the plaintiff bought the building, relying on the statement. Due to the omission of some restrictions connected with a social housing regulation, the value of the building was much lower than what the expert had estimated and the plaintiff ended up overpaying a substantial amount.

The Supreme Court decided that in considering whether the contract between the parties had protective effects vis-à-vis the plaintiff, it may be relevant whether the instructing

⁵¹⁶ Coester and Markesinis, above n 492, 287. In the same sense Christian von Bar ‘Liability for information and opinions causing pure economic loss to third parties: a comparison of English and German case law.’ In B S Markesinis (Ed.) *The gradual convergence. Foreign ideas, foreign influences and English law on the eve of the 21st century* (1994) 98, 99.

⁵¹⁷ BGHZ 138, 257. Neue Juristische Wochenschrift, 1998, 1948.

⁵¹⁸ Bussani and Palmer, above n 495, 467.

party was charged with the care of the third party in question. It was not, however, a necessary prerequisite for holding that such duty of care existed. In the present case, it was considered that an interested party who asks for an expert opinion to form the basis of a decision by a certain group, would normally seek to protect not only his personal interests but also those of the other members of the group.⁵¹⁹ So the claim succeeded.

The expansion of the notion of ‘contract with protective effects for third parties’ (*Vertrag mit Schutzwirkung für Dritte*) reached a new level when the Supreme Court applied it to cases where the creditor and the third party, not only did not share similar interests or belonged to the same group but, on the contrary, had conflicting interests. The owner of a house, planning to sell it, requested a valuation from an expert. While he was inspecting the house, the owner on some pretext distracted him, prevented him from looking at the roof and convinced him that there was no defect. The plaintiff, based on that report, bought the house and later, after the transaction was completed, found out serious defects in the roof framework which made the value of the house much lower than what he had paid. He sued the expert for his loss. The Supreme Court held the plaintiff to be included in the protective scope of the contract, regardless of the fact that the seller was interested in a high price and the plaintiff in a low price and even though the seller had concealed the defects of the house.

Coester and Markesinis point out that the fact of having conflicting interests was just the starting point for the real problem of the case. In effect, had the expert been sued by the seller of the house, he could have defended himself by indicating his fraudulent behaviour, since § 334 BGB states that the debtor has the same defences against the third party as against the promisee. Now, since the notion of contracts with protective effect was developed by analogy to third-party-beneficiary contracts, one might be inclined to think that § 334 BGB should apply in the case of the expert too. However, it is clear that that defence would only be appropriate when the promisee and the third party share common interests, but where they are contradictory, it is rather the protection of the third party from the wrongdoing of the promisee, which is called for § 334 BGB.⁵²⁰ The Court decided that there was an implied waiver on the side of the expert to raise a defence of malice. The function of the statement was to dissipate potential distrust of the buyer against the vendor and this could only be fulfilled if the risk of deception by the vendor was taken by the expert. If he were not willing to take this risk, he would be obliged to say so explicitly in his statement.

⁵¹⁹ BGH, November 2, 1983, *Neue Juristische Wochenschrift*, 1984, 355.

⁵²⁰ Coester and Markesinis, above n 492, 287.

In 2002, the general reform of the law of obligations brought a new provision, the extension of which is not yet entirely clear, that may change the future approach towards the liability of experts.

§ 311(3) BGB states:

An obligation involving duties according to § 241(2) ⁵²¹ may also arise with regard to persons not party to the contract. Such obligation arises especially when the third party claims special trustworthiness for itself and thereby exerts substantial influence on the contractual negotiations or on the conclusion of the contract.

2.1.5 Pure economic loss resulting from conduct *contra bonos mores*.

Before the precedential decisions, the courts had granted the third party a claim in tort under § 826 BGB. According to this provision a person is liable if he or she intentionally causes harm to another in a manner that is *contra bonos mores*, a flexible and changing notion, which refers to a minimal set of legal-ethical principles seen as a set of legal value assessments. This approach to the issue of pure economic loss seems to focus more on the quality of the conduct than the relationship between the plaintiff and the defendant.⁵²²

It is not necessary to show that the defendant actually intended to cause the harm: it is enough if he consciously acquiesced in the possibility that harm might occur.⁵²³ According to the traditional view, intention is taken to include the *dolus eventualis*, that is, whenever the defendant is aware of the consequences of his conduct which he accepts as inevitable even though he may not specifically desire them. Therefore, he who gives information off-the-cuff must recognize that it could be false; and the very fact that he still goes ahead and gives the information demonstrates that he has reckoned with the possibility of damage to others and that he has accepted it. This view of the German courts meant that what was essentially careless behaviour ended up elevated to the level of *dolus eventualis* and thereby attracting liability under the terms of § 826 BGB.⁵²⁴

It is clear that the intention of the courts by defusing the subjective requirements (i.e. for intention) of § 826 BGB is to improve the protection of pure economic interest which are so poorly provided for in § 823(1) BGB.⁵²⁵

⁵²¹ § 241(2) BGB: Each party to the obligation may, according to the content of the obligation, be required to apply proper care as to the rights and interests of the other party.

⁵²² Van Gerven, above n 494, 296.

⁵²³ Herbots, above n 498, 148.

⁵²⁴ Von Bar, above n 490, 105.

⁵²⁵ Von Bar, above n 490, 53.

This general provision of the Code was intended from the outset as an all-purpose residual provision, able to accommodate future expansion in the growth of the law of torts, a formula that, in practice, would confer wide pretorian powers. However, the limitations contained in it did not facilitate such growth, with the result that some of the most significant extensions of tort liability have been achieved either through § 823(1), or the expansion of the law of contract, but not § 826 BGB.⁵²⁶

According to Markesinis, there is a certain paradox in § 826 in the sense that, subjectively, it is the narrowest of the three general provisions, since intention is required but, at the same time, objectively, it is the most general, wide and amorphous provision of the Code.

In any event, it was applying that provision that the Supreme Court held that an accountant who intentionally issues a false statement as to the creditworthiness of a firm is acting *contra bonos mores* and is liable to a third party if he realized and acquiesced in the risk that the statement would be transmitted to and relied on by him.⁵²⁷ In the Court's opinion, to consider the intent it is sufficient if it was conceivable on the part of the defendant that the statement could be used in negotiations with a provider and could lead that person into taking a decision disadvantageous to him. The Supreme Court concluded that the defendant, on the basis of its professional experience as tax adviser, had to take into account that the plaintiff would have recourse to bank financing for his purchase.

Van Gerven emphasizes that the judgment illustrates how broadly the notions of unethical conduct and will to harm have been interpreted founding that the defendant, in too readily and superficially preparing and certifying interim financial statements, had acted in a way which could be regarded as being *contra bonos mores*.⁵²⁸

Other cases decided under § 826 include an art expert who deliberately valued highly a fake painting so that his report could be shown to a third person and entice him to buy the picture; an employer who intentionally gave to a third party an untrue reference about one of his employees⁵²⁹; a person who gave recklessly false information about the credit of a third person⁵³⁰; a director of a company who produced what to his knowledge was a false balance sheet in order to attract a potential investor.⁵³¹

⁵²⁶ Markesinis, above n 498, 894.

⁵²⁷ Zweigert and Kötz, above n 500, 614.

⁵²⁸ Van Gerven, above n 494, 281.

⁵²⁹ BGH, *Neue Juristische Wochenschrift* 1970, 2291.

⁵³⁰ BGH, *Wertpapier-Mitteilungen*, 1956, 1229.

⁵³¹ RG, *Juristenzeitung*, 1908, 448.

Contrary to the common law, in German law, liability for information and opinions causing pure economic loss belongs primarily to the area of contracts (with the exception of § 826 BGB). The essential explanation for this different approach has been said to be the fact that § 823 (1) restricts the protection to absolute rights which are listed in that paragraph in an exclusive manner. On the contrary, in the common law, the doctrines of consideration and privity of contract have blocked the expansion of contract law. The notion of ‘assumption of liability’ is not strange to German lawyers either; however, the German doctrine of assumption of liability represents contract law being used to correct a tort law system which is too narrow.⁵³²

In 1979, the Supreme Court held that a person who gives in good faith false information and subsequently becomes aware of its falsity may, under certain circumstances, be under a duty to correct it and if he does not do so he will be liable under § 826 BGB.⁵³³

The case dealt with an employer who, in good faith, wrote an unusually good reference for his bookkeeper. Armed with that reference, the employee managed to obtain a very good position elsewhere. However, it was later discovered that the bookkeeper had been misappropriating large sums of money whilst working for his former employer. Confronted by the latter, he requested some time to have the opportunity to pay him back. Time was given and the bookkeeper used that time to steal money from his new employer. The Supreme Court allowed the claim against the first employer on the ground that the first employer had, in breach of his duties, failed to revoke the letter of recommendation

2.1.6 Other provisions.

Another provision, considered by some authors, relevant to pure economic loss cases is § 824 which establishes that a person who declares or publishes, contrary to the truth, a statement which is likely to endanger the credit earnings or prosperity of another is liable for *any damage* arising therefrom, even if he does not know of its untruth but should know it.

Another possible expansion yet to be determined is the so-called ‘right to one’s place of work’ (*Recht am Arbeitsplatz*). The primary aim of the Supreme Industrial Court, by creating this new right, was to safeguard employees from unfair tactics by employers during and after a trade dispute. However, it has been suggested that it could also be understood as a

⁵³² Von Bar suggests that English law could operate more convincingly using the concept of voluntary assumption of liability, were it prepared to do without the doctrine of consideration. Above, n 490, 126.

⁵³³ BGHZ *Juristenzeitung* 1979, 725.

right intending, further, the protection of the wider interests of all workers in a continuous and unhindered use of their earning capacity, not only against unfair employer tactics, but also against acts of third parties. According to this view, an employee could, for instance, have an action in tort for loss of earnings against a third party who, by injuring or killing his employer in an accident, caused his employment to be interrupted or terminated. Professor Grunsky submits that pure loss of earnings or earning capacity should be elevated to a special status and granted the protection of the law of tort. He argues that working capacity has nowadays, as an interest, overtaken in social importance the interests to (physical) property or other quasi-proprietary interests. For the vast majority of ordinary people, he says, their working capacity is their main and most valuable asset. The limitation of tortious protection, outside personal injury, to physical property only, is, therefore, in his view, anachronistic.⁵³⁴

2.2 Economic loss in France.

2.2.1 Generally.

As explained in the previous chapter, according to the French Civil Code, the principle of *neminem laedere* is the general rule⁵³⁵, and the instances in which a person is at liberty to cause harm can be classified as exceptions to that general rule. Articles 1382 and 1383 of the Napoleon code do not contain any *a priori* limitations on the scope of protected persons.⁵³⁶ Wrongdoing and unlawful behaviour are never understood or described in relational terms. The unitary general clause contains no conceptual equivalent to the restrictive, relational concept of the duty of care which plays such a decisive role in the common law.

Art. 1382 is formulated in very broad language and is interpreted as creating a universal obligation not to cause harm (the nature of which is unspecified) to ‘another’. The idea of interpreting the word ‘another’ narrowly so as to limit the class of plaintiffs to those who are the immediate and direct victims of the negligent act would make a civilian feel uncomfortable.⁵³⁷ In this sense, it could be said that the notion of ‘another’ (the victim) has a

⁵³⁴ Banakas, above n 491, 21.

⁵³⁵ However, the general fault liability of art. 1382 develops on a case by case basis J.M. Barendrecht, ‘Pure economic loss in the Netherlands’ in E H Hondius (Ed) *Reports to the Fifteenth International Congress of comparative Law* (1998)116.

⁵³⁶ A tentative to develop a theory of an Aquilian relativity of the duty of care in civil law failed. J. Limpens, ‘La théorie de la relativité Aquilienne en Droit Comparé’ in *Mélanges Savatier* (1965) 559.

⁵³⁷ ‘Du moment qu’un acte fautif lèse le droit d’autrui, la compensation est due. Il est contraire aux principes généraux de la responsabilité civile de restreindre à la victime immédiate le droit à la compensation. Par contre, il ne peut être question d’indemniser toute personne, quelle qu’elle soit, des conséquences d’un acte fautif. Le

much stronger or closer biblical resemblance than the Atkinian neighbour. Howarth, submits that it would be good for lawyers to reflect that in the original Biblical parable (10 Luke 25-37) the Samaritan, a traditional enemy of the injured Judean, is declared to be the true neighbour of the Judean because he showed mercy on him, unlike the Judean's fellow countrymen, the Priest and the Levite, who passed on the other side. Thus, the 'neighbour' is not the person who had a special or pre-existing relationship with the injured man, the one who might be thought to be 'proximate' to him, but instead is the person who acts in proper manner, even towards the enemy.⁵³⁸

Since there is no limitation on the class of protected persons, there is no need to prove that a duty of care was owed to the plaintiff. Questions of tort liability are approached by verifying the existence of the usual elements of fault, causation and damage, rather than by preliminary reference to a *numerus clausus* of protected rights or interests. In clear contrast to German and common law systems, there is no material means by which recovery can be peremptorily blocked before the tripartite elements are examined.

In France, the expression 'pure economic loss' is almost unknown.⁵³⁹ There is hardly any specialized literature on this subject and no internal criticism of its remarkable permissiveness. French law does not rule out from delictual liabilities any particular type of harm: the concept of *dommage* covers what an English lawyer would classify as personal injury, psychiatric harm, distress, injury to reputation, damage to or loss of property and pure economic loss. Art. 1382 is a general clause whose wording allows assumption of liability for any act that causes any kind of damage, as long as the act can be said 'fautive'. Unlike the German civil code, the French civil code does not hold a narrow view of the interests that are to be protected by tort law. The principle of full reparation strongly suggests that there should be no reason to exclude from the field of tort a form of damage so commonly recoverable in contract. Pure economic loss should simply meet the same requirements that any other type of damage must satisfy with respect to proof of its existence or certainty. Fault, causation and

débat, à notre avis, ne doit pas se situer de façon formaliste et artificielle autour de l'interprétation large ou restrictive à donner au mot *autrui*, mais autour du véritable problème: celui de la relation causale. Jean Louis Baudouin, *Les obligations* (1983) 100.

⁵³⁸ David Howarth, 'Negligence after Murphy: time to re-think' (1991) 50 *Cambridge Law Journal* 65.

⁵³⁹ 'Le problème du dommage économique pur est difficile à traiter pour un juriste français, car celui-ci, a priori, ne connaît ni le problème, ni même l'expression!' Christian Lapoyade Deschamps, 'La réparation du préjudice économique pur en droit français,' in Banakas, above n 491, 89. Also Christophe Radé and Laurent Bloch, 'Compensation for pure economic loss under French Law' in Willem van Boom, Helmut Koziol and Christian Witting (Eds) *Pure Economic Loss* (2004) 41. Von Bar notes that the fact that the distinction between 'pure' and 'other' types of economic loss took roots also in England is, in one sense, quite remarkable given that the English law of torts thinks in terms of standards of conduct and not, as Germans do, in terms of protected rights and interests. Above n 490, 107.

damage may be examined using standard rather than special rules. Accordingly, a victim should be fully compensated irrespective of the kind of loss that he or she has suffered⁵⁴⁰ and when, in fact, recovery is refused for purely financial damage, the result is never due to a particular objection in principle to the nature of the damage but simply because causation or certainty of damage failed to be established. As Marshall puts it, in theory, a claim in respect of economic loss is just as good as any other and it may depend on the factual circumstances which include the absence of legal damage, the uncertainty of loss, the fact that the defendant's conduct does not amount to fault, the absence of any right of the plaintiff's which has been infringed, assumption of risk or contributory negligence by the plaintiff, or the fact that such loss might equally well have been suffered anyway.⁵⁴¹

In that sense, the French legal system and its emphasis on reparation represent great interest from a comparative point of view. The remarkable permissiveness toward pure economic loss, as well as the complete indifference to the policy arguments against recovery very relevant elsewhere, are probably simply astonishing for a common law lawyer. This could only find a parallel in the disconcerting wonderment suffered by a civilian when confronted with the huge controversy surrounding the recovery at common law of negligently inflicted pure economic loss.

Bernard Rudden, in his well-known article, drew attention to the paradox that the French seem to ignore almost all of Cardozo's warnings without suffering ill effects.⁵⁴² Against all predictions that the sky will fall, the French judge is immutable. To those who argue that the floodgates of liability must be firmly closed, the French experience must seem counterintuitive, an empirical enigma awaiting for an answer.⁵⁴³

The fact that the only control mechanisms to prevent the floodgate in economic loss cases in civil law are general concepts of fault (the breach of the duty to act as a reasonable person with respect to reasonably foreseeable and avoidable prejudice), causation, and broad statements to the effect that the loss must be certain and direct without having experiencing any judicial crisis is the most clear evidence that legal chaos will not necessarily follow a change in the way common law regulates the recovery of economic loss.⁵⁴⁴

⁵⁴⁰ Geneviève Viney, in J Spier (Ed) *The limits of expanding liability* (1998) 109.

⁵⁴¹ D Marshall, 'Liability for pure economic loss negligently caused – French and English law compared' (1975) 25 *International and Comparative Law Quarterly*, 750.

⁵⁴² B Rudden, 'Tortles' (1991-92) *Tulane Civil Law Forum* 105, 107.

⁵⁴³ Palmer and Bussani, above n 495, 38.

⁵⁴⁴ Daniel Jutras, 'Civil law and pure economic loss: what are we missing?' (1986-1987) *Canadian Business Law Journal*, 308.

Whether there is a hidden exercise of policy behind those elements (for instance, manipulating the causal requirement and attributing a negative result to a tenuous link, or finding the damage not certain) is more difficult to determine.

Bussani and Palmer conclude that although the French delictual system takes no particular note of economic loss, there is evidence of a subconscious concern with the question of excessive, indeterminate liability toward third persons. They stress that it is difficult to detect policy since it is never avowed.⁵⁴⁵ Markesinis also points out that French judges are perfectly aware of the danger of indeterminate liability and gives some indication about instances in which the theoretical possibility of compensation for economic loss turns into a refusal in practice.⁵⁴⁶

Palmer and Bussani conclude that, from a comparative perspective France's emphasis on reparation holds great interest since it presents an appearance of maximum permissiveness toward pure economic loss as well as an appearance of maximum indifference to the strong policy arguments usually made elsewhere against recovery.⁵⁴⁷

2.2.2 The cable cases.

Factual situations such as those found in the typical cable cases that trouble German law as much as common law, do not encounter any particular difficulties in French law. That does not mean that liability is necessarily open-ended, but simply that the control is going to be exercised through one of the general elements of liability.⁵⁴⁸ Any of them, and in particular the causal link, leave ample room for controlling the recovery of pure economic loss where it seems excessive in accordance with the 'sense of disproportion' of the judge. No need of seeking additional support from contractual remedies (as in Germany) is detected.

In the paradigmatical situation where a plaintiff has suffered economic loss as a result of the interruption of a public service (water, gas, electricity) caused by a negligent contractor, the courts usually do not view the absence of any physical harm as an indication that the loss should not be compensable. In 1970, the *Cour de Cassation* decided a case where a bulldozer broke a methane gas line which provided energy to the plaintiff's factory. The production was interrupted and damage resulted. The Court ruled that the plaintiff's case

⁵⁴⁵ Bussani and Palmer, above n 495, 456.

⁵⁴⁶ Basil Markesinis, 'La politique jurisprudentielle et la réparation du préjudice économique en Angleterre: une approche comparative.' *Revue Internationale de Droit Comparé* (1983) 31, 44.

⁵⁴⁷ Palmer and Bussani, above n 495, 38.

⁵⁴⁸ Herbots, above n 498, 144.

was well founded under art. 1382 (fault liability) and held that his economic loss was a ‘direct consequence’ of the ruptured gas line.⁵⁴⁹

On similar facts, workers cut a high-tension cable belonging to Electricité de France. As a result of the ensuing power cut, work at a factory had to be stopped. The court of first instance granted the claim up to the amount of the salaries paid to the employees for the time during which they had to remain idle. The Court upheld the decision stating that the loss suffered by the plaintiff was the ‘direct consequence’ of the public works carried out by the defendant.⁵⁵⁰ It is interesting to see that McLachlin J. of the Supreme Court of Canada has stressed that causation and the common law notion of proximity play similar roles:

[P]roximity may be seen as paralleling the requirement in civil law that damages be direct and certain. Proximity, like the requirement of directness, poses the requirement of a loose link between the negligent act and the resultant loss. Distant losses which arise from collateral relationships do not qualify for recovery.⁵⁵¹

Neither the *Cour de Cassation* nor the *Conseil d’État* found any restrictions on holding the plaintiff liable due to the fact that the loss was not consequential on damage to property. Both loss of production and property damage fall indifferently under the category of *dommages matériels*. The loss of revenue was certain (and not merely hypothetical) and direct consequence of the tortious act and, therefore, recoverable. The only scope for limiting liability would be through the application of the criterion of causation, for instance if a break in the chain of causation could be proved.⁵⁵²

Banakas points out the lack of agonizing analysis of the nature of the loss as physical or purely economic, in the manner of English and American courts. Both precedential cases were reported only in summary revealing the routine character of those decisions.⁵⁵³

It is important to stress that the *Cour de Cassation* has no control over the quantification of damages. In a case of an illegal strike that caused damage to a factory, the lower courts held that the conditions for art. 1382 were fulfilled, but they just awarded nominal damages. On the appeal, the *Cour de Cassation* stated that it could not review the amount of the damages discretionarily set by the lower courts.⁵⁵⁴

⁵⁴⁹ Civ. 2e, 8 mai 1970, Bulletin Civil II 1970, n° 160.

⁵⁵⁰ Conseil d’État, 2 juin 1972. However, Esmein warns that declaring that the damage is ‘direct’ is without significance because the judges declare damages to be direct or indirect in accordance with their desire to award, or not to award, an indemnity. Note Cassation civil 2e, 28 avril 1965. Dalloz 1965, 777.

⁵⁵¹ *Canadian National Railway v Norsk Pacific Steamship* [1992] 1 S.C.R. 1021 at 1137.

⁵⁵² Van Gerven, above n 494, 241.

⁵⁵³ Banakas above, n 490, 17.

⁵⁵⁴ Bussani and Palmer, above n 495, 173.

2.2.3 Other situations.

Another illustration of the generous attitude of the French courts towards recovery for pure economic loss is the case of the employees of a beauty salon who sued the driver of a car which had crashed through the window of their working place, forcing it to close down for six months for repairs. A court in Nanterre ordered the driver to compensate the employees for their lost wages.⁵⁵⁵

On another occasion, the operator of a dredge had to compensate the expenses of boat owners who could not have access to a harbour because, due to the defendant's negligence, one part of the dredge had been lost in the harbour, making it unsafe for navigation.⁵⁵⁶

For some authors⁵⁵⁷, the most striking illustration of the broad conception of the notion of protected interests in France is the case of the driver of a vehicle who caused an accident that interrupted the traffic. The *Court de Cassation* granted compensation to the City of Marseille for the loss of profits that it sustained when its buses were unable to get past the place of the accident due to the traffic jam.⁵⁵⁸

2.2.4 The manipulation of causal requirements.

No doubt, French law has the most open or liberal approach towards compensation for pure economic loss. Whether or not there is a subtle exercise of policy considerations to limit recoveries of this type of damage by the judges is hard to say. All we can do is illustrate with some examples where the courts felt that it was necessary to place some limit upon the recovery of pure economic loss. Invariably this was done through the manipulation of the causal requirement.⁵⁵⁹

An example where the damage was considered indirect is the case of a singer who had an accident and had to cancel a concert. The organizer suffered an economic loss and filed a

⁵⁵⁵ Tribunal de Grande Instance de Nanterre, October 22, 1975. *Gazette du Palais* 1976, 1392.

⁵⁵⁶ Cassation Civil 2ème, March 19, 1980. *Dalloz* 1980, 414.

⁵⁵⁷ Pierre Giovannoni, 'Le dommage indirect en droit suisse de la responsabilité civile, comparé aux droits allemand et français', *Revue de droit suisse* (1977) 31, 46.

⁵⁵⁸ Cassation Civil 2ème, April 29, 1965. *Gazette Palais* 1965.2.257

⁵⁵⁹ Markesinis refers to the multiple resources used by the judges, sometimes skilfully, sometimes arbitrarily: 'Une variété de dispositions *causales*, qui parfois semblent faire double emploi, ont été habilement (sinon quelquefois arbitrairement) utilisées pour atteindre ce résultat. Dans certains cas, on dit que la victime a assumé le risque; dans d'autres cas, que le préjudice subi n'est qu'indirect; dans d'autres encore, qu'il n'est qu'hypothétique et non pas certain. Mais dans tous le cas, la possibilité de dédommagement est théoriquement reconnue.' Basil Markesinis, 'La politique jurisprudentielle et la réparation du préjudice économique en Angleterre: une approche comparative.' *Revue Internationale de Droit Comparé* (1983) 31, 45.

claim against the person who caused the accident. The *Cour de cassation*, holding that the damage was indirect, dismissed the action.⁵⁶⁰

In another case a creditor who was not able to collect a debt from someone who was killed in a traffic accident claimed damages from the person liable for the accident. The debtor's heirs did not accept his succession and, therefore, the estate could not pay the debts of the deceased. The Court of Appeal ruled that the plaintiff's loss should not be viewed as the 'certain' result of the defendant's act and, therefore, held it was unrecoverable. Considering the length of time for repayment and the risks that the debtor might discontinue his work, the anticipated repayment was aleatory. The Supreme Court, however, quashed this decision, stating that repayment of a loan of money is never, in a juridical sense, aleatory. The case returned to another Court of Appeal that, in turn, ruled that while the creditor's damage was certain, it was not 'direct' since the refusal of the heirs to accept the debtor's succession broke the chain of causation creating a *nova causa interveniens*.⁵⁶¹

In another case, the plaintiff's leading tenor was injured and unable to perform in the plaintiff's opera allegedly causing the box-office takings to fall. The *Cour de Cassation* did not allow recovery, on the ground that the fall in takings could depend on multiple circumstances or incidents than the failure of a talented singer.⁵⁶²

In some occasions the French courts might use the notion of loss of a chance in order to award at least some compensation. In a famous case, a very well-known football player (Kemp) was killed in a car accident. His club (*Football Club of Metz*) claimed a potentially sizeable transfer fee as well as loss of revenues since fewer people would pay to watch the team. The Court of Appeal stated that if the accident had not occurred, the player would have probably signed another year's contract (helping the club's profitability), or he might have demanded a transfer to another club, in which case they would have profit also with the transfer fee. In both cases, the club lost a chance to realise an advantage from a patrimonial asset.⁵⁶³

Banakas submits that because the conditions of 'directness' and 'certainty' are not related to property damage in a common law sense, nor to invasion of property rights in the German sense, it is almost impossible to tell what they are all about. He stresses the fact that French judges are notorious for not providing fully reasoned decisions. The result, he says, is that in a codified tort system relying heavily on case law to fill in the details, there is little

⁵⁶⁰ Civ.2e 14 Novembre 1958. Gazette Palais, 1959.1.31.

⁵⁶¹ Civ.2e 21 February 1979. Dalloz 1979.IR 344. Commented by Markesinis, above n 546, 45.

⁵⁶² Civ 2e. 14 nov. 1958, Gazette Palais, 1959.1.31. (Demeyer v Camerlo)

⁵⁶³ Colmar, 20 april 1955. Dalloz, 1956, 723. (Football Club de Metz v Wiroth).

guidance in the masses of cases about the judicial criteria of ruling on important issues such as ‘directness’ and ‘certainty’ of loss. He concludes that we shall never know whether French judges are simply shifting around the various causes of each and every loss, including the defendant’s fault, and attributing the loss to the one that best serves policy, like English and American judges do.⁵⁶⁴

Marshall also qualifies the nature of directness as a criterion in French law as unsatisfactory. Besides the fact that the doctrine has failed to agree on what directness means, he points out that all *dommage par ricochet* is, by definition, indirect, and so there should not in principle be recovery in such a case; and most of all, indirectness is synonymous with a vague notion of remoteness, the content of which is determined by policy rather than by a legal test.⁵⁶⁵

2.2.5 Auditor’s liability.

Liability for incorrect financial advice in a general clause system, such as France, is based on the simple principle of reparation of any loss or injury resulting from fault and causal connection.⁵⁶⁶ Without derogating the general principles of liability established by arts. 1382 and 1383 of the civil code, art. 234 of the law of commercial companies imposes liability to auditors for their negligence vis à vis the company and third parties.⁵⁶⁷

By reaffirming this general principle in the area of auditor’s liability towards third parties, the legislator made it clear that the third party is not an ‘indirect victim’ whose prima facie right to recovery is uncertain.⁵⁶⁸

The auditor is liable in contract toward the company for the loss resulting from his shortcomings in the exercise of his general or specific tasks and in tort toward third persons.

⁵⁶⁴ Banakas, above n 491, 17. Also Esmein suggests that ‘*le tribunaux qualifient un dommage direct ou indirect suivant qu’il leur plaît ou non d’allouer une indemnité...*’ Note Dalloz, 1967.77.

⁵⁶⁵ Marshall, above, n 540, 767. According to Herbots it would be a mistake to consider *le dommage par ricochet* as indirect in the sense of French law. Above note 497, 144.

⁵⁶⁶ The same is true for other general clause systems such as the Spanish, the Austrian, or the Italian. Cf. Stathis Banakas, ‘Liability for incorrect financial information: theory and practice in a general clause system and in a protected interests system.’ 7 *European Review of Private Law* (1999) 261, 262.

⁵⁶⁷ The organization of the auditing profession is mainly regulated by the law of commercial companies (Loi n° 66-537 24 July 1966)

Art. 234. ‘*Les commissaires aux comptes sont responsables, tant à l’égard de la société que des tiers, des conséquences dommageables des fautes et négligences par eux commises dans l’exercice de leurs fonctions.*’

⁵⁶⁸ Lara Khoury, ‘The liability of auditors beyond their clients: a comparative study.’ (2000-2001) 46 *McGill Law Journal* 413, 455.

If he deliberately misstates financial information, he may incur penal responsibility by way of a fine or prison term.⁵⁶⁹

Following the general principles, the third party will have to prove the auditor's fault, the loss and that his or her damage is a direct consequence of the auditor's mistake. However, fault will almost always be presumed in cases of incorrect information supplied by professional defendants, as French courts have recently been pursuing a very aggressive development of professional liability towards not only clients, but also, in tort, towards third parties.⁵⁷⁰

On more than one occasion, courts have shown reluctance to allow recovery in favour of third parties even in the event of fault on the part of the auditor by refusing the claim on the ground of causation. Several reasons for this restrictive approach have been pointed out: a) the auditor's fault is usually one of omission rather than positive action; b) his fault is never the only cause of the damage which creates evidentiary difficulties; c) since their work is not meant to provide any certainty, it should normally be only one of the factors involved in the assessment of the financial situation of a business.⁵⁷¹

It is generally accepted that the auditor assumes an obligation of means (*obligation de moyens*), so as to oblige the victim to bear the burden of proof as to the shortcoming and the resulting losses. The auditor is not a guarantor of the authenticity of the information he compiles and so it has been held that where incomplete and disordered documents were submitted, which included a fraudulent invoice that had no suspicious appearance, fault was not shown because such matters could escape a normally vigilant auditor's attention.⁵⁷²

A particular difficulty might arise in relation to big share buyers who can have a full picture of the financial status of a company relying on other sources of information available to them and not only the accountant's statement. Prospective small shareholders will probably almost entirely rely on published financial statements as their sole source of information before acquiring their shares, but big buyers will attempt to form their own opinion on the financial status of the company based on other sources too.

In most cases of refusal, the plaintiff is defeated because the evidence shows that, despite the errors of the report, he knew or should have known about the real situation from

⁵⁶⁹ Commercial Companies Act, art. 457.

⁵⁷⁰ Cour de Cassation. Chambre commerciale, 17.10.1984, *Juris Classeur périodique* 1985 II.20458 note A. Viander.

⁵⁷¹ Bussani and Palmer, above n 495, 455.

⁵⁷² Tribunal de Commerce de Paris, 12 juillet 1984. Bulletin CNCC, 1985. 478 *Juris-Data* 001646.

other sources of information at his disposal and he failed to exercise reasonable care in relying on the accounts.⁵⁷³

The *Cour de cassation* decided in 1989 a case where the plaintiff had invested in a company. According to a provision in the agreement, a second investment occurred after the accounts of the company were approved on the basis of the report of the auditor. This was followed by other investments. Subsequently, a verification requested by the board of directors showed an important loss, which did not appear in the certified statements. The Court refused the claim. The plaintiff had been present at the meeting of the board of directors where it was decided that accounting investigations were necessary and that some order had to be brought into the management of the company. The plaintiff, therefore, had been sufficiently alerted by the apparent irregularity of the accounts and could have decided to postpone subsequent investments until after the investigations requested by the board had taken place. No mention of any distinction between existing and new shareholders was made. This notion appears to be unknown in French law.

Sometimes the concept of contributory negligence, allowing only partial compensation has been considered adequate.⁵⁷⁴ In 1984 the Court of Appeal of Paris held an auditor liable for only half the damage suffered by the plaintiff. It considered the plaintiff's attitude careless and imprudent since he did not verify the values indicated on the accounts, carry out a thorough accounting verification, or seek information from the auditor. It was also stated that he should have requested a more recent statement, since the one in question was already six months old at the moment of his investment.⁵⁷⁵

The courts do not require the auditor's fault to be the only or even the main cause of the plaintiff's loss.⁵⁷⁶ It is believed that the consequence of such an approach would make the case inadmissible in many circumstances where the cause of the loss is multiple. Often examples of this occur when a person buys shares relying on the wrong accounts of a company that collapses later due to bad administration or fraud. (Is the cause of the loss, the misstatement, or the bad administration?) In these cases, the concept of loss of a chance has been applied.

⁵⁷³ Khoury, above n 568, 458.

⁵⁷⁴ Viney, above n 540, 108.

⁵⁷⁵ Paris, 1 February 1984, Rev.Soc. 1984.779 (Annot. D.Schmidt)

⁵⁷⁶ In *Irwin (Management Consultants) v Thorne*, Ridell [1991] R.R.A. 187 however, it was required that the statements be the principal factor. Also in Portugal wrong information does not have to be the sole reason that gives rise to liability for the business conduct that led to the damage; contributory cause is sufficient. Jorge Ferreira Sinde Monteiro in J Spier (Ed) *The limits of expanding liability* (1998) 173, 174.

The notion of actual reliance does not seem to appear among the causation requirements. This was specifically stated in a case where, in spite of lack of reliance, the auditor was held liable due to the fact that his faulty omission had allowed the company to continue its existence and to benefit from a clean reputation, thereby creating a false sense of security in the mind of the creditors. The Court considered that the creditors, contrary to shareholders, do not get involved on the basis of the statements of the company, but by reason of its simple existence and reputation.⁵⁷⁷ The wrong idea created in the plaintiff's mind and the fact that this error prompted the plaintiff to act to his detriment seem to have been considered material by the court as to establish the existence of causal link.

Knowledge of the specific plaintiff or class or plaintiffs to whom the statements will be shown does not appear to be relevant either.

As a general rule, the plaintiff will have to prove his damage. A shareholder who allegedly paid too much for his shares if the accounts would have been correct, will probably have some difficulties in proving what price would have been paid without the mistake since this often has to do with other circumstances not related with the accuracy of the statements.⁵⁷⁸

2.2.6 Liability for economic loss without fault.

Finally, a brief reference to a particular area of economic loss should be made: liability for economic losses without fault.

Some established categories of no-fault liability of the administration in France include: a) injury caused by public works, use of dangerous things including cars and aircrafts, and military activities; b) injury caused by lawful but abnormal activities of the administration; c) injury suffered as a result of the operation of valid laws or regulations, affecting a class of individuals in a disproportionally harsh manner.

A well-known source of no-fault liability of public authorities in France is the escape of borstal boys causing damage to members of the public. All authorities responsible for the safe detention or supervision on parole of criminals or mentally disturbed persons are liable, without fault, to citizens suffering financial loss as a result of such persons escaping and

⁵⁷⁷ Rouen, 27 April 1982. Bulletin C.N.C.C. 47.288.

⁵⁷⁸ Spier, above n 540, 159.

causing damage.⁵⁷⁹ In two famous cases, *La Fleurette*⁵⁸⁰ and *Caucheteux et Desmont*⁵⁸¹ the *Conseil d'État* (the Supreme Administrative Court) initiated a new area of liability. According to this novel jurisprudence, the State is also responsible, under certain conditions, for special and abnormal injury caused to citizens by valid law, or delegated legislation, as well as lawful judicial action, causing the same type of injury. In a case where a governmental corporation caused financial loss to a private citizen by lawfully starting and then, lawfully, again, withdrawing from an expropriation procedure, it was held that compensation should be granted.⁵⁸² The notion that the lawful activity of the State cannot breach the principle of equality before public duties (*égalité devant les charges publiques*) appears to be behind the decision.

2.3 Economic loss in Italy.

The Italian civil code does not mention the category of pure economic loss either. Therefore, due to the fact that no distinction is made between that type of loss and material damage, compensation has never been denied for economic losses in cases where the general requirements for liability in accordance with art. 2043 cc were fulfilled.⁵⁸³

In relation to typical cable cases the best illustration in Italy is covered by *Enel v Ditta Giampaoli*⁵⁸⁴ and specially, the so-called *Pastificio Puddu*⁵⁸⁵ case. The first one is related to negligent excavation works that cut a cable that delivered energy to a factory. The defendant was liable based on the broad principle of art. 2043 combined with art. 2050cc. This last provision establishes that:

‘Whoever causes injury to another in the performance of an activity dangerous by its nature or by reason of the instrumentalities employed, is liable for damages, unless he proves that he has taken all suitable measures to avoid injury.’

Since that case, the judicial interpretation consistently given to that article is of simple applicability to excavation situations. This has risen some critique from some doctrine which

⁵⁷⁹ Efstathios K Banakas, ‘Public authority liability for pure economic loss: a comparative study of English, German and French law.’ (1992) *Revue Hellénique de Droit International* 39, 64.

⁵⁸⁰ Conseil d'État, 14 January 1938, *Dalloz* 1938 III 41, note Rolland.

⁵⁸¹ Conseil d'État, 21 January 1944 *Recueil Sirey* 1945 III 13.

⁵⁸² Conseil d'État, 23 December 1970, *Juris Classeur périodique* 1971 II 16820.

⁵⁸³ Art. 2043. ‘Any fraudulent, malicious, or negligent act that causes an unjustified injury to another obliges the person who has committed the act to pay damages.’

⁵⁸⁴ App. Ancona, 23.11.1982, *Rassegna Giuridica Enel*, 1982, 747.

⁵⁸⁵ Cass. 24.6.1972, n° 2135, *Il Foro Italiano* 1973, I, 99.

considers that it imposes an excessively heavy burden, equivalent to a ‘quasi-strict liability’, on excavation activity.⁵⁸⁶

In the second case, some workmen cut the supply of power to a pasta factory which had to be idle for many hours. ‘Pasta Puddu’ company had signed a supply contract with ENEL (National Electric Company) for the power needed for its plant; the right (of the creditor) to obtain that supply was damaged not by the debtor but by a third party, responsible for a tort which had caused real and irreparable damage to the pasta company. On the basis of these substantiating elements, the Supreme Court held that the losses were recoverable.⁵⁸⁷

In 1978 a first instance court found negligent the conduct of an excavator who had begun his works without asking previously about the location of the underground cables.⁵⁸⁸

In *Vecchio v Telecom Italia*⁵⁸⁹ the issue of the probability of contributory damage by the plaintiff for not giving enough information in relation to the location of the underground cables was raised.⁵⁹⁰

The classic doctrine for economic losses derived from injury to a person or property suffered a dramatic widening during the 1960s and 1970s which ended in the landmark known as the *Meroni* case.⁵⁹¹ A famous football player was killed in a car accident. His team, the Torino Football Club sued for damages alleging economic loss.

The Supreme Court held that a creditor can recover damages for the economic loss he suffered from an injury to his debtor. It held that art. 2043 did not make any distinction between absolute and relative rights in determining whether or not compensation should be given. Therefore, injury to credit can be redressed in tort when such injury is definitive and irreparable, as in the case of killing of an irreplaceable debtor.⁵⁹²

⁵⁸⁶ S Mannina, ‘La responsabilità civile dell’esercente de un’attività di escavazione in caso di danni a cavi sotterranei’, note under App. Roma, 12.7.1995, *Temi Romana*, 1996, 643.

⁵⁸⁷ Francesco Busnelli, in J Spier (Ed) *The limits of expanding liability* (1998) 137, 142.

⁵⁸⁸ Tribunale di Torino, 31 may 1978, (1979) *Rassegna Giuridica Enel*, 379.

⁵⁸⁹ Cass.23.8.1999, n° 8838, *Danno e responsabilità*, 2000, 512.

⁵⁹⁰ A M Musy and L Zamnelli, ‘Cable cutting all’italiana. Ipotesi di concorso di colpa del danneggiato per omissione di informativa’ note to the decision in *Vecchio*.

⁵⁹¹ P.G. Monateri, ‘Economic loss in Italy’ in Banakas, above n 491, 197.

⁵⁹² The Supreme Court changed its position. In 1953, in the case of an airplane crash, due to a mistake of the pilot, all the players of, again, the same team (Torino Football Club) had died. After the accident, the Turin Soccer Club sued the air carrier seeking redress for the damage arising from the loss of its players. Recovery was denied. Von Bar, above n 490, 31 (note 152). Also Ricardo Omodei-Salè and Alessio Zaccaria, ‘Compensation for pure economic loss under Italian law’ in Willem van Boom, Helmut Koziol and Christian Witting (Eds) *Pure Economic Loss* (2004) 48, 49.

The *Meroni* doctrine is, since then, used whenever an employee is wounded or killed in an accident and the employer is bound by statute to keep paying wages.⁵⁹³

The most famous decision in Italy about inaccurate information is the so-called ‘De Chirico’ case.⁵⁹⁴ The plaintiff was considering buying a painting by De Chirico. He was not convinced by the seller that the painting was authentic so he decided to approach the painter. De Chirico was quite old at the time. He recognised it as his and painted on it a second signature at the back of the painting. Later it was discovered that in fact it was a forged copy. In the meantime De Chirico died and since the plaintiff could not find the seller he sued the widow Mrs. Paskwer. It was certain that De Chirico did not act deliberately but negligently.

The Supreme Court (*Corte di Cassazione*) quashed the judgment of the Court of appeal rejecting the claim. It held that the harm the plaintiff suffered was an injury to the right of patrimonial integrity and, more specifically, the right to freely determine transactions concerning the patrimony (guaranteed within the bounds of art. 41 of the Constitution) and that the misinformation that he received from De Chirico violated his right of free choice (to buy or not to buy) as it was reasonable for him to rely on the truthfulness of his statement. The Court had no doubt that an infringement of such a right could be characterized as unjust injury within the meaning of art. 2043 of the Civil code and therefore, in principle, recoverable.

It has been submitted that after the De Chirico case it is crystal clear that whenever there is a damage (other than moral damage) the patrimony suffers a loss, therefore, creating an unlimited possibility to sue for economic losses.⁵⁹⁵

2.4 Economic loss in The Netherlands.

In the Netherlands, according to its *Burgerlijk Wetboek*, the most recent civil code in the world (1992), liability exists for unlawful damage that can be imputed to a person’s fault or from a cause for which he is answerable according to law or common opinion. (art. 6:162) The same provision also states what acts are deemed to be unlawful: the infringement of a subjective right, an act or omission violating a statutory duty, or conduct contrary to the standard of conduct acceptable in society.

⁵⁹³ In a subsequent case, the Court of Cassation even held that it was irrelevant whether the employee was ‘irreplaceable’, whether he was dead, or whether he had only temporarily lost his working capacity. *Corte di Cassazione*, sezione unite 12 November 1988, n. 6132. *Foro italiano* 1989, I, 742.

⁵⁹⁴ *Corte di Cassazione*, 14 May 1982. n° 2765 (De Chirico). *Giurisprudenza italiana* 1983-I-1-786

⁵⁹⁵ Monateri, above n 590, 199.

The Dutch civil code rejected the narrow view of the interests that are to be protected by tort law, like the German BGB (§ 823.1), having adopted instead a general clause similar to art. 1382 of the French civil code. Therefore, as in France, pure economic loss liability is not a special issue, but simply another instance of fault liability, which develops on a case by case basis.⁵⁹⁶

Several devices are available, however, to put some limits when pure economic loss would become too burdensome. Fine-tuning fault liability, in order to limit from the outset, and the rules regarding causation would be the most important ones.

The Supreme Court (*Hoge Raad*) has decided in 1977⁵⁹⁷ that the mere circumstance that those who are at fault and therefore liable are at risk of being confronted with an extensive number of claims does not alter the duty imposed upon them by law.⁵⁹⁸ The case concerned excavating operations that damaged a gas main owned by a public utility. Consequently, a neighbouring brick factory had to halt production for lack of gas. The defendant's argument that the causal connection was too remote and that this specific form of damage was unforeseeable was rejected. The Court decided that foreseeability is a factor that may be taken into account in the process of ascertaining causal connection. However, other circumstances must be taken into consideration as well.

The dependency of the third party on the supply of gas was used as an argument in its favour. In the Court's view, this showed the directness of the causal link between the negligent act and the damage. However, the Supreme Court also suggested that a very high degree of dependency would mean that the third party should have taken precautions. Because this had not been part of the debate in the proceedings (the defendant not raising this line of defence) the Court was not requested to decide the issue; therefore, it remains open whether having excessive dependence on a public utility without taking precautions could in any way constitute contributory negligence.

In a similar case, the Supreme Court decided about damage caused by a military aeroplane to an electricity cable. The pilot did a nosedive in the vicinity of a high voltage cable. He had got orders to do so, while he was, negligently, not informed about the existence

⁵⁹⁶ Barendrecht, above n 535, 115.

⁵⁹⁷ HR 1.7.1977, *Nederlandse Jurisprudentie* 1978, n°84

⁵⁹⁸ Bussani and Palmer, above n 495, 198. Von Bar, above n 490, 38, note 188.

of the cable. The *Hoge Raad* held that a duty of care⁵⁹⁹ existed toward those dependent on electricity supplied by the cable; the damage was foreseeable.

An important exception to the possibility to recover for pure economic loss follows from the rule that only the injured person himself can recover in cases of personal injury. Therefore, claims of creditors of a victim of a car accident are barred, unless the third party have incurred costs which are for the benefit of the victim.⁶⁰⁰ The Supreme Court, in the *Lapinus* case, extended this principle to the claim of a company that incurred loss of income, because its employees were injured by pollution in the air stemming from a neighbouring manufacturing plant.⁶⁰¹ However, a new article 6:107a has been added to the Dutch civil code which enables employers to claim for the cost of continued payment of wages. According to that provision whenever statute or contract obliges the employer to provide his employee with sick pay, the employer can claim that amount from the injurer, if, and to the extent that the injurer is liable *vis-à-vis* the employee.

Dutch courts do not seem to be reluctant to grant claims for pure economic loss to third parties as a consequence of a breach of contract by professionals either. The public notary may have duties towards third parties, who are involved in the transactions of his clients⁶⁰²; the one who helped a bank with property transactions to the detriment of the creditors of the bank was also held liable⁶⁰³; a lawyer who forgot to file a brief in court in time was liable for the pure economic loss of the persons who in turn rented the premises from the bailee he represented.⁶⁰⁴

Reliance on financial information by investors has also been the subject of favourable decisions by the Supreme Court that held a bank liable for credit information issued to a creditor of its client⁶⁰⁵; another bank was held liable for the misleading information contained in a prospectus.⁶⁰⁶

Apart from the above referred rule, which is just judicial interpretation, there is no general rule limiting recovery for pure economic loss. As in other civil law systems, fault and causation are the most frequent safety valves in order to limit liability, but other devices are

⁵⁹⁹ Many authors equate the concept of duty of care to the Dutch concept of 'maatschappelijke zorgvuldigheid'. Cf. Bussani and Palmer above n 495, 199. We have some doubts about the appropriateness of this. It seems to be misleading since the Netherlands have a general clause system.

⁶⁰⁰ Barendrecht, above n 535, 118.

⁶⁰¹ Hoge Raad 12 December 1986, *Nederlandse Jurisprudentie* 1987, 958.

⁶⁰² Hoge Raad 15 September 1995.

⁶⁰³ Hoge Raad 23 December 1994.

⁶⁰⁴ Hoge Raad 2 April 1982, *Nederlandse Jurisprudentie* 1983, 367.

⁶⁰⁵ Hoge Raad 10 December 1993, *Nederlandse Jurisprudentie*, 667.

⁶⁰⁶ Hoge Raad 2 December 1994, *Nederlandse Jurisprudentie* 1996, 246.

at hand too, such as mitigation (*mitigating*). In effect, Section 6:109 BW states that awards for damages can be mitigated, if full compensation would be clearly undesirable in a particular case. The courts have to take into account the kind of liability, the kind of relationship between the parties and the financial means of the parties.

The Dutch code also contemplates the possibility to introduce ‘cap’ damages. Although some professional organisations have lobbied for their liability to be capped, there seems to be no reaction from the legislator up to now.⁶⁰⁷ Van Boom believes that the imposition of a cap on damages awards may well prove useful in some areas of pure economic loss, like auditor’s liability. According to his view, where a single negligent act can cause a number of large claims for pure economic loss, the use of a general statutory limit upon damages may strike a fairer balance between the right level of deterrence and over-deterrence (with possible practices as a negative consequence)⁶⁰⁸

Barendrecht submits that until now the argument that liability is extending too far has not been heard very often in the area of pure economic loss. The only instance that is disputed is possibly the one of auditors and accountants towards third parties relying on their statements. But this problem is dealt with as a separate issue and not as a signal that something is wrong with the compensation of pure economic loss in general.⁶⁰⁹

2.5 Conclusions.

The study of the systems under comparison of the present chapter indicates that there is a clear approximation between the German and English approaches in relation to economic loss. Both of them seem to have made up their minds that, in principle, negligently inflicted economic losses should not be compensated.

However, in spite of the fact that the reasons which led to the decision not to compensate in principle pure economic loss are broadly similar in both systems, the legal devices used to achieve this aim are quite different: Germany excluding pure economic loss from the list of interests which receive legal protection, the common law relying on the concept of duty. In relation to the accountant’s liability, in particular, while the common law suffers from a narrow concept of contractual liability and needs to turn to Tort for filling a protective gap, German law suffering from a narrow concept of Tort liability turns to

⁶⁰⁷ Cf. Bussani and Palmer, above n 495, 465 and bibliography cited there.

⁶⁰⁸ Van Boom, above n 593, 199.

⁶⁰⁹ Barendrecht, above n 535, 133.

contract. But, remarkably, departing from the different ends of the civil spectrum, both systems find sometimes themselves converging on the same ground of liability, which is the legitimate reliance of the plaintiff on the accuracy of advice or information supplied in the context of a relationship justifying such reliance.

If the original approximation is clear, the future is not. A considerable consensus has been achieved today in Germany that the distinction between consequential loss upon physical damage to property and pure economic loss no longer responds adequately to the changed social and economic conditions of present times. The emphasis on land and tangible property as the main basis of economic welfare, though prevalent when the BGB was drafted, now seems outmoded. It is considered that there are significant signs, economic and legal, that suggest that nowadays rights and financial claims have moved into the centre of private wealth. This new perspective can be seen in the huge intellectual efforts of the *Bundesgerichtshof* in trying to find ways of expanding the protective scope of the system. At the same time, in the common law, the growing number of exceptions to the non recovery rule, calling into question the very basis on which claims for pure economic loss should be limited, the lack of coherent policy and satisfactory principle and an apparent process of constant expansion and retraction seem to indicate the uncertainty of the system about which should be its final trend.

On the other hand, in French law and its derivatives, loss of any type is recoverable wherever fault, damage and a direct and immediate causal connection between the two are established. Factual situations such as those encountered in the 'cable cases' in Germany or in the *Spartan Steel* case in England have not caused the kind of difficulties that they have provoked in both English and German law. French law shows clear indifference to German and common law concerns about the cataclysmic effects attributed to an eventual full recognition of economic loss. If any concerns of that type exist, they are plenty confident that relying on the notion of fault, causative devices and the normative concept of damage (requiring it to be certain, immediate and direct) are more than enough for the purposes of controlling the limits of liability. Civilian jurisdictions use very effectively the basic general test of delictual liability (fault, damage and causal link), without regarding economic loss as a separate category of damage, without requiring associated physical damages and without the common law consternation over the problems of foreseeability. In front of such effective and transparent guidelines, the adequate question seems to be: if the same results are probably going to be reached, why should things be made complicated when they can be made simple?

If in the common law, it could be said that the battle for compensation of economic loss still remains to be won, in the civil law nobody seems to have heard of such a battle.

PART III: CONCLUSIONS.

In 1881, Oliver Wendell Holmes made his most influential statement on the fact that logic is not the decisive factor nor has it a paramount influence in the development of the law. There is no doubt that when Holmes J remarked that ‘the life of the law has not been logic, it has been experience’¹, he was simply observing that law, as developed by judges, had been mainly concerned with securing decisions which seemed to make practical good sense. He was not praising illogic as a virtue. It is clear that since legal reasoning is a form of thought it must be logical, i.e. must conform to the laws of logic, on pain of being irrational and self contradictory. There is no doubt that the law has to be rationally consistent with itself.

Unfortunately, the most famous utterance of the most prestigious oracle of the law ended up being used to its exhaustion to justify any decision no matter how contradictory or unacceptable from a rational point of view. It seemed to be assumed that, if logic did not compel judicial decision, its role must be trivial, or noxious. This serious misinterpretation led to a situation where ‘English lawyers and writers have tended to think of it as almost a virtue to be illogical, and have ascribed that virtue freely to their law; *being logic* is an eccentric continental practice, in which common-sensical Englishmen indulge at their peril.’²

In the 60s, Luis Recaséns Siches, a famous Spanish jurist devoted to legal philosophy, developed a theory which evaluated the significance of the criticism against using logic in the legal field. He believed that most of the criticism that existed against the inadequacy of logic within the field of the law have in mind the traditional logic (Aristotle, Bacon, Stuart Mill, etc.), namely, the physic-mathematical logic, but that that did not exhaust the whole domain of logic. Apart from the field of that, he said, there is another logical domain related to human life, which is precisely that of application to the law, and which he suggested to be called the ‘logic of the reasonable’ as differentiated from the ‘logic of the rational’ connected with mathematics and physics. He emphasized that ‘logic of the reasonable’, although different from pure logic of mathematical nature, was still strictly rigorous logic which did not involve at all granting any permission to any kind of irrationalism. In regard to every case, easy or difficult, he said, it is necessary to think of it *reasonably*.³

¹ Oliver W. Holmes, *The common law* (1881) 1.

² Neil MacCormick, *Legal Reasoning and Legal Theory*, (1994) 40.

³ Luis Recaséns Siches, ‘The logic of the reasonable as differentiated from the logic of the rational (Human reason in the making and the interpretation of the law)’ in Ralph Newman (Ed) *Essays in Jurisprudence in Honor of Roscoe Pound* (1962) 192, 204.

These remarks acquire particular significance in areas such as psychiatric harm, 'where the silliest rules now exist' and economic loss, where arbitrariness prevails and limited margin for logic or reasonableness has been left.

It has been submitted that in the common law, the recovery for pure economic loss and for psychiatric injuries under the tort of negligence are the last major battlegrounds for the neighbour principle. In relation to pure economic loss, the problem of defining harm and the fraud issue which exist in relation to psychiatric harm are largely absent, but in respect to the widespread liability the concerns are similar in both situations. Economic harm shares with psychiatric harm a characteristic open-endedness which has traditionally prompted courts to impose limits upon potential exposure to liability for even foreseeable harm.

In addition to that, it could probably be said that the courts' reluctance to grant recovery for emotional injury is partially based on an often unarticulated societal devaluation of emotional injury.⁴ Perhaps the clearest example of this unconscious or hidden devaluation of psychiatric harm is the *Palsgraf* case. It is astonishing that the exact nature of the injuries of Mrs. Palsgraf in what is probably one of the most celebrated cases of all times was not even stated in the no less famous Cardozo's opinion. 'The scales struck the plaintiff causing injuries for which she sues', is all he says while describing the facts. It is generally assumed (I even dare to say, unanimously assumed) that the injury was a physical one. The assumption is implied by both Judge Cardozo and Andrews, who spoke in terms of 'the right to bodily security' and 'the safety of others.' However, in spite of the fact that the scale hit her arm, hip and thigh, the injury for which Mrs. Palsgraf sued was a speech impediment brought on by the accident⁵, that is, a typical nervous shock case!

The chief perceptible effect of the accident, according to the doctors, was a stammer. She began to stutter and stammer about a week after the event and it was with difficulty that she could talk at all.⁶ At trial, evidence was introduced that Mrs. Palsgraf suffered from 'traumatic hysteria'.⁷ According to her daughter, she later became mute and spent her life in ill health and depression.⁸

⁴ Leslie Sandon & Carol Berry, 'Recovery for negligent infliction of emotional distress attendant to economic loss: a reassessment.' (1995) 37 *Arizona Law Review* 1247, 1258.

⁵ Robert Rhee, 'A principled solution for negligent infliction of emotional distress claims.' (2004) 36 *Arizona State Law Journal* 805, 848.

⁶ Noonan John T. Jr, *Persons and masks of the law. Cardozo, Holmes, Jefferson and Wythe as makers of the masks* (1976) 127.

⁷ Robert Rabin & Stephen Sugarman (Eds.) *Tort Stories* (2003).

⁸ Roberts, 'Palsgraf kin tell human side of famed case.' *Harvard Law Rec.*, April 14, 1978, 1, 9.

Obviously Cardozo was aware of that, but he was deliberately elliptical in that regard for if the true nature of the injury was revealed, that is, if the injury was described as ‘shock’, he thought the case would not have had the influence that he intended.⁹

Be it as it may, if in fact an unconscious devaluation of emotional harm existed in the past, in the 21st century, however, society perceives intangible injuries as real and worth protecting. In its eyes, fairness demands that the tort system should provide some method of redress to victims of such injuries. Mental injuries are not less debilitating nor less worthy of legal recognition.

The common thread running through the limitations on recovery for psychiatric harm and economic loss is not difficult to identify. The concern about widespread liability establishes, somehow, a sense of congruence between emotional harm and economic loss cases: the spectre of collateral claims, virtually unlimited in number, as a result of a single accident. The distinctive character of these two types of harm, however, have been placed in great doubt and they could more appropriately be described as nothing but one aspect of the general problem of limiting widespread tort liability.¹⁰

The fear that an expansion of the duty of care would open the door to an uncontrollable explosion of claims, as we have seen, is one of the most significant policy factors restricting the recognition of recovery for psychiatric injury and economic losses. The anxiety that a chain reaction of claims may follow an isolated negligent act has been frequently voiced in both psychiatric and economic loss cases. In fact, it has become increasingly clear that nearly all arguments for restricting negligence liability are at bottom versions of the floodgates argument. Exceptionally, in some instances, embarrassment or hesitation pervades the decisions to the point that trying to determine how decisively this fear

⁹ Contrary to his appearance of impartiality, Cardozo had a personal stake in the outcome of the case. As one of the collaborators in drafting the Restatement of Torts, he was engaged in the pursuit of an abstract truth. At the time *Palsgraf* was about to be argued before his court, Cardozo, invited by Bohlen, attended an American Law Institute meeting at which the facts of the case were presented as a ‘perfect illustration’ of the unforeseeable plaintiff problem. It appears that *Palsgraf* itself, not an imaginary case, was made the basis of the discussion before the Bohlen committee of the ALI, even though the case had not been yet finally adjudicated. Bohlen’s discomfort with what he knew to be parallels discussions before the ALI and the New York courts may be seen in the minute changes made in the facts of *Palsgraf* used to illustrate § 165 of the Restatement of Torts about to be finally approved in May 1929. The package in *Palsgraf* became ‘a number of obviously fragile parcels’. The unspecified injury to Mrs. Palsgraf became an injury to ‘A’s eyes’, although no damage was involved in the actual case. Bohlen may have felt that these minor changes in otherwise identical facts were necessary to demonstrate that the case discussed before his committee had not really been *Palsgraf*. The current editions of the Restatement abandoned this pretense. Walter Otto Weyrauch, ‘Law as a mask—Legal ritual and relevance.’ (1978) 66 *California Law Review* 699, 705 n.25.

¹⁰ Robert L Rabin, ‘Characterization, context and the problem of economic loss in American tort law.’ In Michael Furmston (Ed) *The law of tort. Policies and trends in liability for damage to property and economic loss.* (1986) 36.

weighed in the judge's mind can be only a matter of conjecture. In *Weller & Co. v Foot and Mouth Disease Research Institute*¹¹ for instance, Widgery J. stressed the fact that in an agricultural community (such as the one involved in that case) the escape of foot and mouth virus could be a tragedy which could foreseeably affect almost every business in that area. Yet, he went on saying that the rejection of the claim does not, and should not, rest on this potential for extensive liability: 'the magnitude of these consequences must not be allowed to deprive the plaintiffs of their rights, but it emphasized the importance of the case'.¹²

The old spectre that broadening the right to recover for non physical injuries will mean to overburden the judiciary with an enormous increase in its caseload, however, should not persist. The evidence in civil law countries shows no indication that flood litigation have resulted in these cases. Even in the common law, experience is replete with instances where judicial resistance to extensions of liability on the grounds of avoiding the crushing burden of liability without limit was abandoned without any evidence that the new rules left a wake of crushed defendants. The clearest example of them all is probable *Winterbottom v Wright*.¹³ Although I have said at the introduction that this thesis had not the purpose of pretending to demonstrate the superiority of one system over the other, I feel entitled to draw the attention to the fact that the consequences of a pro-liability rule of recovery for non physical harm, so much feared by English courts, by instinct or tradition, but certainly with no hard evidence to support such belief, has not produced in the civil system the cataclysmic results that they constantly predict. It is surprising that such a powerful evidence does not give signs of any persuasive force in common law courts.

One of the most frequent arguments is that, if defendants have to pay damages, that would place too heavy a burden on useful activity. That fear has two closely related aspects. First, it is said that there is the possibility that a large damage judgment will exceed the defendant's resources, bankrupting him. The argument, however, is clearly unconvincing if considering the actual judicial lack of particular reluctance to allow recovery in cases involving widespread physical harm. No court today would refuse to hold a defendant liable in a case involving catastrophic physical loss that has created the potential for unlimited claims. Considering the entire range of *catastrophic* injury cases, from an airplane crash to the collapse of a dam, no one would seriously argue that the presence of multiple claims for personal injury based on a negligent act, in and of itself, requires a court-imposed duty

¹¹ [1965] 3 All. E.R. 560 (Q.B.)

¹² At 563.

¹³ (1842) 10 M & W 109.

limitation in these situations. Rather than wholly denying recovery, courts without much difficulty and more properly limit liability by applying a proximate-cause foreseeability analysis, on a case-by-case basis.

The unlimited liability concern may also contain an element of fear that a negligent defendant will be held liable for damages out of proportion to his fault.¹⁴ Yet, this has nothing to do with non physical damage in itself. On the contrary, it is a general limitation proper of a tort system which is based on the idea of fault and all-or-nothing approach to damages. This feature, common to all conventional systems of civil liability, forces however regretfully, to accept the consequence that, while liability is undoubtedly based on fault, the extent of liability has no relation to fault whatever. Thus, there is no fundamental reason why the common law should keep its strong commitment to the all-or-nothing approach with liability resulting either in full compensation or no compensation at all. The *logic of the reasonable* seems to be absent in the notion that, because certain consequences would represent an excessive burden for a defendant, the deserving innocent plaintiff has to go completely uncompensated for the damage suffered. After all, ‘if the result is all out of proportion to the defendant’s fault, it can be no less out of proportion to the plaintiff’s entire innocence.’¹⁵

With the conviction that imperfect justice is the lesser of two evils if compared to no justice at all, some countries in the civil law (like The Netherlands, art. 6.109 BW; Switzerland art. 43.1 and 44.2 COS and Portugal art. 494 C.C.) have come to a compromise admitting a *relative* or *limited* compensation proportional to the degree of fault. Nothing impairs the common law to adopt and develop an approach along these lines which would certainly help to reinforce the centrality of the role that blameworthiness is supposed to have in the system.¹⁶ Moreover, *ad hoc* control could have the advantage that the courts would have to explain (in more detail) why they moderated the amount of damages.

The increasing significance that the courts have come to attach over the course of more than a century to the problem of personal injury and the fact that the common law does no longer show reluctance to extend liability to cases of widespread physical harm (as it did in an earlier era) might suggest that psychiatric harm and economic loss are simply aspects of a period of inevitable historic evolution where the common law will finally lose its

¹⁴ W. Prosser, *The law of Torts* (1971), 334.

¹⁵ *Idem* 257.

¹⁶ This could be coupled with van Boom’s suggestion that courts should wait for the flood to come and then act accordingly. In other words, if a defendant can substantiate his claim that liability would open the floodgates and would render the financial burden limitless or otherwise unbearable, *then* the courts should be able to turn the tide. Willem H van Boom, ‘Pure Economic loss: a comparative perspective’ in van Boom, Koziol and Witting (eds) *Pure Economic Loss* (2004) 39.

fragmentary character. The demise of the privity bar, the increasing recognition of psychiatric damage and the parallel increasing of exceptions to the non recovery rule for economic losses seem to indicate that there is a tendency in the common law to a more integral protection of the person. At the same time, there is room to believe that the common law is in fact heading towards a single and wide principle of liability. Its resistance to elaborate a single general theory, founded upon nothing but the pragmatic objection that it provides a means of avoiding unlimited liability, might be just the temporary expression of the inner struggle to find a way of doing it without losing control of its limits.

From the extensive comparative research of the previous chapters, it seems possible to conclude that in the common law an exaggerated concern for policy has diminished or impaired a proper authoritative and clear exposition of principle. The impression is that judges are not deciding according to principles at all. Case after case we have witnessed judges imposing policy constraints in the name of administrative convenience or public necessity. Courts systematically declare their commitment to the pragmatic restriction on the doctrine of foreseeability, without which, they say, ‘foreseeability loses much of its ability to function as a rule of law.’¹⁷ The argument that the physical harm requirement acts as a boundary on limitless liability seems to underestimate the potential of legal reasoning and experience to limit liability. At the same time, to accept that the only way to impose restrictions to an otherwise boundless liability for a simple act of negligence is by means of a bright-line rule, eliminates the significant consideration of whether a more flexible open-ended criteria based upon the traditional concepts of negligence would not be more convenient.

A civilian observer cannot avoid noticing that the central concern of limitless liability and the consequent policy arguments, so frequently seen in the common law, bring at no point into consideration the fundamental question about why should the victim carry on his or her shoulders all the weight of a public necessity. In the law of non physical damage, judges and legal writers have concentrated their attention almost exclusively on the reasons for limiting the scope of liability, having paid insufficient attention to the reasons for imposing liability in the first place. The crucial point, which appears to be neglected, however, is that in most of the cases and no matter what policy indicates, the defendant was at fault and the plaintiff was not. This offends generally accepted principles of justice and is undoubtedly at odds with the notion that, to the extent which is possible in human society, there should be

¹⁷ *State of Louisiana ex rel. Guste v M/V Testbank*. (1985) 752 F.2d 1019 at 1029.

reward or punishment according to our behaviour.¹⁸ In other words, those responsible for causing injuries should bear the costs of their tortious conduct, irrespective of the classification of the resultant damages. Whatever system society decides to impose, it should create an expectation that those who act in accordance with the system will be able to preserve their accumulated wealth and values, including health, psychic and economic well-being.

There is something indigestible in the idea that, because of an empirical assumption, insensitive to the most basic notion of fairness and equity, a plainly innocent plaintiff has to absorb all the damages instead of the negligent defendant. There is something unacceptable when policy outweighs justice making the process of moral valuation unduly subordinated to pragmatic concerns. In a complex normative system like the law, that is inescapably intertwined with the morality of the society in which it operates, it is required that the choices made somehow reflect ‘the ethical or moral sense of the community, its feeling of what is fair and just.’¹⁹ Judicial decision should not be lacking the necessary content of moral sensibility that the principle that wrongdoers ought to pay for their wrongs represents, nor should they be in disjunction with the social perception of where liability should lie in individual cases, for the courts are nothing but ‘the spokesman of the fair and reasonable man’.²⁰

In a way, all cases that involve policy seem to be expressing the idea of *convenience*, not of reasonableness. I believe that if, instead of asking ‘is it *convenient* that this defendant compensate this plaintiff’ (which is behind all policy decisions) the question were ‘is it *reasonable* that this victim suffers this loss caused by this plaintiff’, the approximation to substantial justice would be much closer. If having a law of tort largely developed on the basis of what judges consider is more convenient to the public interest (instead of what is just between the parties) represents a serious anomaly, to reduce everything to the question of what outcome is administratively more convenient certainly represents an abandonment of ‘precisely those questions that make tort law a unique repository of intuitions of corrective justice.’²¹

By treating the litigants only instrumentally as simple representatives of convenient outcomes, the courts are missing the significance of the rights-vindicating structure of tort

¹⁸ ‘It is a principle of civil liability...that a man must be considered to be responsible for the probable consequences of his act. To demand more of him is too harsh a rule, to demand less is to ignore that civilized order requires the observance of a minimum standard of behaviour.’ *The Wagon Mound (n 1)* [1961] A.C. at 422.

¹⁹ F. Harper & F. James, *The law of torts* (1956) 743.

²⁰ *Dorset Yach Co. v Home Office* [1970] AC 1039.

²¹ George Fletcher, ‘Fairness and utility in tort theory.’ (1971-1972) 85 *Harvard Law Review* 537, 538.

law. Weinrib suggested that tort law should not be considered as a vehicle of public policies, but as a repository of non-instrumental judgments about action. The concern should be with the propriety of an action.²² The focus should be exclusively on the nature of the defendant's act and the fairness of holding him liable, rather than the *inconvenience* of attributing liability to his conduct. Because tort adjudication is morally limited to what is inherent in the defendant's doing and the plaintiff's suffering of the same harm, a court cannot impose upon the relationship an independent policy of its own choosing. It intervenes at the instance of the wronged party in order to undo or prevent the wrongful harm. Adjudication thus conceived makes explicit what is latent in the relationship between the parties. It does not involve the legislative selection of a course of action that will promote the general welfare.²³ As Spier put it, opting for a dismissal may well contribute to the wealth of nations on a macro level but it is not necessarily fair, seen from the plaintiff's point of view. Why should he be sacrificed in the altar of the floodgates?²⁴

The often mentioned criticism that the real factors controlling judgments should be fully disclosed and that that is the reason why the more recent tendency to express policy arguments is welcomed, misses the point. The point is that the doing and suffering of harm cannot be the occasion to further an independently justifiable goal, such as avoiding the floodgate.²⁵ Tort law should not be public law in disguise.²⁶ Public policy is a tool of the legislature, not of the judicature and it is certainly justifiable to condemn any step of the courts beyond the proper limits of the judicial role.

It has long been accepted that the basic structure of tort law is made up of two features, the procedural bipolarity of plaintiff and defendant and the doctrinal centrality of fault and causation.²⁷ Thus, when the courts refer to considerations of policy, they certainly go far beyond the interests of the immediate parties to the litigation; they are not concerned with its implication as between any particular claimant and defendant. On the contrary, their concern is with the potential impact that the recognition of a duty might have upon a number (if not innumerable) parties who are not before the court.

If one searches in the history and the evolution of the policy issue, one will find that the expression 'public policy' is of not very old standing in English law.²⁸ Leaving aside

²² Ernest Weinrib, 'The special morality of tort law.' (1988-1989) 34 *McGill Law Journal* 403, 404.

²³ *Idem*, 409.

²⁴ *The limits of expanding liability*. J. Spier (Ed.) 1998, 7.

²⁵ Weinrib, above n 22, 403.

²⁶ Contrast, L. Green, Tort law: Public law in disguise (1959-1960) 38 *Texas Law Review* 1, 257.

²⁷ Weinrib, 'Understanding tort law.' (1989) 23 *Valparaiso University Law Review*, 485.

²⁸ Knight W.S.M. 'Public policy in English law.' (1922) 38 *Law Quarterly Review* 207.

some earlier obscure references that can be discovered in the Year Books of the 15th century, the first instance in which the term ‘public policy’ is judicially used with a clearly intended definition is Lord Mansfield’s speech in *Homan v Johnson*²⁹ stating that ‘The principle of public policy is this: *ex dolo malo non oritur actio*. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act.’³⁰ Thus, the introduction of the term in English law appears clearly associated with bare immorality and illegality. In other words, it was a conceptualistic device to reinforce the moral dimension of the law.

The process in the common law seems to be going from the early times of strict liability (a man acts at his peril), throughout the heyday of negligence where the focus was on fault, to the present period where policy occupies such a central and dominant place that it could be affirmed that the true principle is that if policy demands, there is no liability even if at fault. The ethical standard of reasonable conduct that replaced the unmoral standard of acting at one’s peril seems to be now substituted by a new unmoral standard (liability resting entirely on reasons of policy). At the beginning of last century, Professor Ames submitted that the early law asked simply, ‘Did the defendant do the physical act which damaged the plaintiff?’ and that the law of his time asked, ‘was the act blameworthy?’³¹ It seems fair to say that the question today would be, ‘is liability supported by policy?’ which, in a way, is nothing but returning to a standard as unmoral as it was before.

Critics argue that in civil law there is the tendency to obscure policy considerations behind the general concepts of fault or causation. For a common law lawyer, since the questions of causality and certainty of damage are questions of fact, some inconsistencies and unpredictabilities are unavoidable. The advantage of such an approach, however, is that it involves the use of known concepts which are flexible enough to yield the desired results conferring, at the same time, the consistency that whenever a person can foresee damage to another (be it physical, mental or economic) he or she is under a duty to take care. Thus, it is suggested that allowing or denying recovery for negligent infliction of non physical harm

²⁹ (1775) 1 Cowp.

³⁰ At 343.

³¹ James Barr Ames, ‘Law and morals’ (1908-1909) 22 *Harvard Law Review* 97, 99. An interesting range of opinions is presented in (a) Wigmore, ‘Responsibility for tortious acts: its history’ (1894) 7 *Harvard Law Review* 315, 383, 441 suggesting that law began with an amoral concept that a man acts at his peril and gradually developed toward the theme of liability based on fault; (b) Holmes, *The common law* (1881) 1, 3, 4 suggesting that in early law liability was associated with revenge, and was based on the thought that someone or something was to blame, and that though in a sense law always measures liability by moral standards, it is continually transmuting these moral standards into external or objective ones, from which the actual guilt of the party concerned is wholly eliminated; and (c) Isaacs, ‘Fault and liability.’ (1918) 31 *Harvard Law Review* 954 suggesting that culpability has always been an important factor in determining rules of liability, and that the degree of emphasis on culpability has alternately waxed and waned.

using traditional negligent analysis instead of just policy would result in stronger unity and harmony of the system.

It has been said that to seek the solution in terms of remoteness (or any other traditional negligence concept) instead of policy, will at best lead to an evasion of judicial responsibility to articulate the genuine premise of the decision, and at worst deceive the court as to the true nature of the issue before it.³² What has not been said, however, is that to use policy to deny redress to a deserving victim is to alienate the courts from its most ancestral and fundamental function: to do justice between the parties; it does not reflect the special moral character of the law and clashes with the overriding purpose of contemporary tort law: compensating wronged persons for their injuries. After all, 'liability for negligence, whether you style it such or treat it as in other systems as a species of *culpa*, is no doubt based upon a general public sentiment of moral wrong-doing for which the offender must pay.'³³

It is interesting to remember, for instance, that in the *Alcock* case, there were 16 plaintiffs initially, and that eventually all of them lost on the *duty of care* issue, despite the admission of negligence by the police and without ever having to prove whether or not they had suffered the relevant form of loss. The perverse function of policy can be seen if considering that what the court was asked to do was to judge on a preliminary and limited question: was there a duty of care owed to these plaintiffs by this defendant? It is not clear how and why the fact that the potential number of plaintiffs in that case were hundreds of people were present and thousands were watching at home should alter the answer to that initial question. This example clearly shows that open or frank articulation of the policy factors influencing a decision does not help to make it less unfair when those who without justification harmed others by their conduct do not put the matter right.

In that context, it is suggested in this thesis that the question of tort liability would be more accurately analyzed if the concept of duty were eliminated. Besides the well known argument that the requirement of duty involves circularity,³⁴ the artificiality of judicial determinations that defendants owe no 'duty' to plaintiffs seems alien to the significant moral dimension that the law of torts is supposed to represent and clashes with the most ancient axiom of any civilized culture: *alterum non laedere*. The notion that the absence of a concept of duty of care makes French law open-ended is simply wrong.

³² J.G. Fleming 'Remoteness and duty: the control devices in liability for negligence.' (1953) 31 *Canadian Bar Review* 477.

³³ *Donoghue v Stevenson*. [1932] A.C. 562, 580.

³⁴ Julius Stone, *The Province and function of law*. Also in *Legal reasoning and lawyers' reasonings*. (1964) 258.

One would like to presume that the common law has moved beyond the belief that ‘a man is entitled to be as negligent as he pleases towards the whole world if he owes no duty to them.’³⁵ The immorality subtly lying underneath the notion of duty has already been stressed by Howarth when he affirmed that ‘duty of care cases are cases in which the defendant says, so what if I was at fault and you were harmed as a consequence, I win anyway.’³⁶ It is certainly discomforting to think that it is in the best interest of society to conclude that where there is no ‘duty’ an individual may act negligently. A tort analysis that requires this element as a starting point seems inconsistent with the fundamental moral notion underlying the rule of liability that each of us owes a duty to all others to refrain from acting negligently. Certainly, this does not mean suggesting that is part of the business of the courts to impose a code of ethics, yet, ‘it remains as true today as it ever was that the law of tort must remain the ‘ultimate secular guardian of morality within the fields with which it is concerned.’³⁷

It has been submitted that the negligence concept must be acclaimed as the most creative factor in the modern law of tort liability, ‘a unifying force of vast potential in a branch of law which has suffered its due share of haphazard development and historically-conditioned anomalies.’³⁸ However, it is undeniable that the source of its persuasiveness and attraction, which rests upon the fact that it makes liability commensurate with fault, fades when the force of that general principle suffers from constant limitations.

No doubt, limitation of liability is a controversial issue where there is an appealing and apparently morally sound basic principle at work. Once a strong justifying principle is discovered and generally applied, it becomes more difficult (and far less acceptable for the Clapham omnibus passenger) to limit the application of that principle for policy reasons. The system seems to be destabilizing when judges, stepping beyond the proper limits of the judicial role, systematically compromise through an exaggerated expression of policy concerns well established and central organizing concepts such as fault and causation. Simple principles as fault and causation, unrefined as they may be from a legal point of view, nevertheless, give society as much morality as can be introduced by tort law, eliminate the complex analytical labyrinth that may severely restrict recovery in many non physical damage cases and pragmatically they have been found for centuries in the civil law capable of judicial management.

³⁵ *Le Lievre v Gould* [1893] 1 Q.B. 491, 497.

³⁶ Howarth, *Textbook on tort*. 162.

³⁷ J.A. Jolowicz, ‘The law of tort and non physical loss’. (1972-1973) *Journal of the Society of Public Teachers* 91, 92.

³⁸ Fleming, above n 32, 471.

The time has come to abandon the anachronistic protection of negligent defendants against economic loss and psychiatric harm. Courts in the common law should stop crying wolf trying to convince people that they must stoically endure the varied harms that modern society is increasingly inflicting upon them. The concept that ‘resignation, not litigation is the response to the vicissitudes of life’ represents archaic_Victorian values incompatible with modern society. Citizens should have an entitlement to non physical tranquillity just as they are entitled to be free of wrongfully inflicted physical injuries. Tort law is not just about administrative expediency, easing the burden on over-worked courts, or making sure that commercial firms are kept in business. More importantly, it is about justice, compensation, deterrence and most of all, about victims.

Foreseeability has long been accepted as an adequate device in cases in which physical injury is immediately caused by the defendant’s conduct. Lawyers and courts are quite familiar with its concept for it has been a linchpin of tort liability for more than a century. There is no reason why in non physical cases courts have to assume that additional protection is necessary. The degree to which a defendant knew or should have known of the extent of the consequences of the negligent conduct should play a dispositive role in a court’s holding in non physical just as it does in physical damage. Application of a foreseeability of harm rule to negligence actions is a concept that courts could also successfully apply to cases of both economic loss and psychiatric damage.

Liability based on foreseeability would serve the dual function of compensation for injury and deterrence of negligent conduct. The role of deterrence in tort law is one of the system’s fundamental aspirations. In that sense, a full recovery rule would result in behaviour changes reducing the number of non physical injuries because of two reasons. First, because this rule would create an incentive not to engage in certain behaviour by increasing the cost of such behaviours. Second, because by making the statement that culpable actors must pay for the non physical injuries they cause, the law will make actors generally more aware of the potential for such injuries and, therefore, increase the probability that those actors will act in ways which minimize the chance of such injuries.³⁹

It has been frequently submitted that, although foreseeability may set tolerable limits for most types of physical harm, it provides virtually no limit on liability for non physical harm. However, even admitting the fact that the notion of foreseeability is to a certain degree

³⁹ Peter Bell, ‘Reply to a generous critic.’ (1984) 36 *University of Florida Law Review* 437, 438. For a critical view of this belief, Pearson, ‘Liability for negligent inflicted psychic harm: a response to Professor Bell.’ (1984) 36 *University of Florida Law Review* 413.

indeterminate, its emphasis on risk is much better integrated in the moral notion of liability for negligence. It facilitates rational risk spreading, correlates liability with the risk that the defendant should expect and used in conjunction with doctrines such as proximate cause could perfectly keep reasonable control of its limits.

Non physical harm issues should be governed by the general rules of tort law long applied to other types of injury. The problems should be solved ‘by the application of the principles of tort, not by the creation of exceptions to them.’ The experience in the civil law shows that mechanisms associated with liability for negligence, such as the fault and causation concepts are sufficient to function as reasonable control devices fashioned by the courts to achieve that purpose. They already represent the necessary combination of logic, common sense and notions of fairness that can usually be ascertained on the basis of intuitive conceptions of justice to adequately limit the class of potential claims.

Jane Stapleton, after summarizing a series of anomalies that generated the collapse of confidence in the law of tort, submits that the problem is that there is a lot of conduct in modern life which can be implicated in the occasioning of injury and much of this can plausibly be described as negligent.⁴⁰ That is precisely why the efforts to establish a single general principle of liability for all negligence cases must be renewed. It is true that negligence law is a wilderness of single instances.⁴¹ But, because all arbitrary lines of demarcation are inevitably going to crumble at some time, what is needed is a broad consideration of principles.

John Noonan recalls that Seavey used to confess an inability to think if confronted by an abstract proposition – ‘Give me a case,’ he would demand.⁴² Unfortunately, it seems inevitable to think in abstract terms if ‘the wilderness of single instances’ is to be conquered and the patchwork to be mended. Less importance has to be attributed to the facts while concepts should be enhanced. In the end, that seems to be the real challenge, for at bottom, the strongest contrast between the civil and the common law appears to be the importance attributed to the facts. In the common law, any construction of an ordered account of the law firmly rests on the disorder of fragmented and dispersed facts. On the contrary, in the civil law tradition, the aim is rapidly to eliminate any trace of the circumstances and to establish an idea or a concept.

⁴⁰ Jane Stapleton, ‘In restraint of tort’ in Peter Birks (ed) *The frontiers of liability* (1994) 83, 84.

⁴¹ Robin Cooke, ‘Tort illusions’ in P.D. Finn (Ed.) 1989, 74.

⁴² Noonan John T. Jr, *Persons and masks of the law. Cardozo, Holmes, Jefferson and Wythe as makers of the masks* (1976).

The reluctance to extend responsibility for nervous shock and economic loss in the 21st century indicates notable and unacceptable gaps in the protection of personal security. A new torts law that fundamentally recognizes the *integrity of the being* must be born. It is suggested in these conclusions that the question whether a defendant is liable to the plaintiff in any particular case of non physical injury would be solved most justly by the application of general tort principles. It is necessary to go to the basics and focus more on three of the constituents of any cause of action: the standard of the defendant's behaviour, causation and especially damage. 'Foreseeability', 'proximity', 'voluntary assumptions of responsibility', etc. are merely variants of the fault principle and its increasing number does nothing but re-emphasize the notion that the fault principle is the real foundation of them all and that it is perfectly possible to take refuge in it to handle really novel or challenging cases without the need to recourse to more detailed principle.

It is submitted that greater consistency in decision making is likely to be achieved by way of legal reasoning based upon tests for fault than on the basis of policy deliberation. There are a number of alternative approaches that coupling the requirement of foreseeability to the application of general principles of negligence could assure more proportional results. Liability could be established, as in any other negligence case, by the conventional use of foreseeability and by fulfilling other requirements of legal proximate cause, without using any of these concepts artificially to serve policy concerns created because the circumstances are of a psychiatric harm or economic loss case.

Serious concerns and incomprehension of the utility of having flexible general rules in a system have systematically been expressed in the common law:

'We are rapidly approaching the day when liability will be determined routinely on a case by case "under all the circumstances" basis, with decision makers guided only by the broadest of general principles. When that day arrives, the retreat from the rule of law will be complete, principled decision will have been replaced with decision by whim, and the common law of negligence will have degenerated into an unjustifiably inefficient, thinly disguised lottery.'⁴³

That type of scepticism is not new. Leon Green emphatically protested against Glanville Williams' affirmation that there should be only one question: was the defendant negligent as regards the damage. 'That the common law of negligence has required more than 150 years of litigation and scholarly writings to arrive at this simply inquiry is

⁴³ James Henderson, 'Expanding the negligence concept: retreat from the rule of law.' (1975-1976) 51 *Indiana Law Journal* 467, 468.

incomprehensible', he said. 'That such a formula will clarify and simplify the issues of duty, negligence, and damages does not seem possible. That it will make judgments easy to reach is subject to serious doubt.'⁴⁴

Those fears are naturally based on a complete disbelief of the utility of general principles. Civil law courts for centuries have managed to cope fairly well with the potential difficulties associated with the negligence concept, and have kept the levels of the extension of liability in negligence cases within reasonable limits through the use of no more than general concepts.

Negligence liability is and will always remain an essentially pragmatic subject where there are no simple solutions for complex problems. Non physical damage is a complex problem and it seems utopian to think that it is possible to solve all issues by magic formulae. However, it might be productive to think whether or not the time has come to discard all artificial distinctions and simply adopt a foreseeability test with traditional negligence control mechanisms such as fault and causation. It is suggested that a formula for all non physical damages universal in its application and indistinctive from physical damage should be tested without preconceptions or unsubstantiated assumed cataclysmic prophecies. The control mechanisms against unlimited loss in the civil law based not in the type of loss but in the factual determination of whether the loss is a direct, certain and immediate result of the negligence have proven to be simple and effective in avoiding frivolous claims and the threat of unlimited liability.

The actual trend of the law of torts in the common law does not seem to reflect the fact that material conditions of life have dramatically changed in the last century, accompanied by ideas and values about social and economic organization, the nature of the individual, and his place in society. The growing space that liability based on risk has gained all over the world during a significant part of that century reveals a substantial shift and focus now directed to the needs of the victim. The actual conception, articulation and implementation of economic loss and psychiatric harm as self-contained categories with severe restrictions to recoverability in the common law go in the opposite direction to those changes. At the same time, liability in the civil law has undergone a huge transformation during that period. From the former philosophy of civil responsibility based on the *debt* of the defendant to make reparation we have moved to a philosophy based on the *credit* of the injured party for compensation. From a pure system concentrated on the action of the

⁴⁴ Leon Green, 'Foreseeability in negligence law.' (1961) 61 *Columbia Law Review* 1401, 1415.

defendant, we have moved to a system of reparation with the attention largely focused on the victim and his or her needs, and what the victim needs is reparation!

It is doubtful that the traditional emphasis that the common law puts on individual freedom is any longer adequate. The greater exposure to damages to which the members of modern societies are submitted to, added to the greater potentiality to cause damages that human conduct has nowadays, demands a system which mainly promotes deterrence and compensation. The common law with its categorisation of different types of losses (pure economic loss and psychiatric injury) being recoverable only under narrowly constrained, special conditions, certainly does not contribute to delineate the model of tort law of the 21st century that is desirable. It is my strong belief that a flexible system following the French guidelines would better represent that model, re-enforcing at the same time the essential ethical content that the present system seems to be lacking.

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